(8)

Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

No. 00-152

In The

Supreme Court of the United States

ARTHUR S. LUJAN, et al.,

Petitioners,

vs.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

Volume I, Pages 1 to 186

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190 pp

TABLE OF CONTENTS

Page

VOLUME I

DOCKET SHEET (District Court) 1

DOCKET SHEET (Court of Appeals) 8

COMPLAINT 16

NOTICE OF MOTION AND MOTION TO DISMISS [F.R.C.P. Rule 12] AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF 31

FIRST AMENDED COMPLAINT 62

NOTICE OF MOTION AND MOTION TO DISMISS [F.R.C.P. Rule 12(b)] AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF 79

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT 116

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES ... 143

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 146

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT 174

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW 176

TABLE OF CONTENTS – Continued

Page

VOLUME II

EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT 187

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 299

STATEMENT OF GENUINE ISSUES OF MATERIAL FACT 332

DECLARATION OF THOMAS KERRIGAN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 336

DECLARATION OF MICHAEL VILLENEUVE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 339

OBJECTIONS TO DECLARATIONS FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 344

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 347

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO MOTION TO DISMISS 366

JUDGMENT 372

OBJECTIONS TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT 380

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO JUDGMENT AND ORDER 383

TABLE OF CONTENTS – Continued

Page

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 392

PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTION TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT 394

RELEVANT DOCKET ENTRIES

U.S. District Court
Central District of California (Western Div.)

7/21/95	1	COMPLAINT (Summons(es) issued) (referred to Discovery Brian Q. Robbins); demand for JT (yt) [Entry date 07/27/95]
	• • •	
8/23/95	4	NOTICE OF MOTION AND MOTION by defendant to dismiss; motion hearing set for 10:00 9/23/95 (dmjr) [Entry date 08/25/95]
	• • •	
9/7/95	9	1st AMENDED COMPLAINT [1-1] by plaintiff G & G Fire Sprinker; adding Div Labor Standards, Dept of Industrial; jury demand; summons issued (dmjr) [Entry date 09/11/95]
	• • •	
9/19/95	17	NOTICE OF WITHDRAWAL by defendant withdrawing motion to dismiss [4-1] (dmjr) [Entry date 09/22/95]
9/19/95	18	NOTICE OF MOTION AND MOTION by defendant Victoria Bradshaw to dismiss; motion hearing set for 10:00 11/6/95 (dmjr) [Entry date 09/22/95]
10/6/95	19	Opposition to dfts' by plaintiff G & G Fire Sprinkler to motion to dismiss [18-1] (es) [Entry date 10/11/95]
10/16/95	20	NOTICE OF MOTION AND MOTION by plaintiff for summary judgment, alt for summary adjudication; motion hearing

set for 10:00 11/6/95 (dmjr) [Entry date 10/18/95]

10/16/95 – LODGED stmt submitted by plaintiff (FWD TO CRD), (dmjr) [Entry date 10/18/95]

10/16/95 21 MEMORANDUM by plaintiff in support of motion for summary judgment [20-1], of motion for summary adjudication [20-2] (dmjr) [Entry date 10/18/95]

10/16/95 22 REQUEST by plaintiff for judicial ntc (dmjr) [Entry date 10/18/95]

10/16/95 23 EXHIBITS, (dmjr) [Entry date 10/18/95]

• • •

10/23/95 24 MEMORANDUM by defendant in opposition to motion for summary judgment [20-1], to motion for summary adjudication [20-2] (dmjr) [Entry date 10/26/95]

10/23/95 25 STATEMENT of genuine issues of material facts by defendant (dmjr) [Entry date 10/26/95]

10/23/95 26 DECLARATION of Thomas S Kerrigan by defendant re [20-1], re [20-2] (dmjr) [Entry date 10/26/95]

10/23/95 27 DECLARATION of Michael S Villeneuve by defendant re [20-1], re [20-2] (dmjr) [Entry date 10/26/95]

10/23/95 28 OBJECTIONS by defendant to decls in suppt of mot for S/J (dmjr) [Entry date 10/26/95]

10/30/95 30 REPLY to dfts' opposition by plaintiff G & G Fire Sprinkler to motion for summary

judgment [20-1] (es) [Entry date 11/06/95]

10/30/95 31 SUPPLEMENTAL by plaintiff G & G Fire Sprinker re declaration [16-1] of Stephen A. Seiderman in supprt of rply to dfts' opposition to mot for S/J. (es) [Entry date 11/06/95]

10/30/95 32 Memo of P/A in reply to opposition by defendant to motion to dismiss [18-1] (es) [Entry date 11/06/95]

11/6/95 36 MINUTES: Crt denies dfts mot to dism & grants pltfs mot for S/J. by Judge Manuel L. Real CR: L LeBlanc (dmjr) [Entry date 11/16/95]

11/7/95 33 ORDER by Judge Manuel L. Real granting motion for summary judgment [20-1] Jgm shall be entered as requested in pla's motion & enjoining dfts from applying or enforcing CA Labor Code agnst pla or on account of alleged violations by pla of CA prevailing wage laws. (ENT 11/9/95) mld cpys & ntc. (ra) [Entry date 11/09/95]

11/7/95 34 ORDER by Judge Manuel L. Real denying motion to dismiss [18-1] (ENT 11/9/95) mld cpys & ntc. (ra) [Entry date 11/09/95]

11/7/95 35 JUDGMENT AND ORDER: by Judge Manuel L. Real ord tht pla is awarded declaratory & inj relief against defendants Dept of industrial, Div Labor Standards, Rosa Frazier, Roger Miller, Daniel Dellarocca, Lloyd W Aubry Jr, Victoria Bradshaw. Dfts are enjoined from applying or enforcing CA Labor Code. Pla shall recover costs of suit terminating case

(ENT 11/9/95) MD JS-6 mld cpys & ntc. (ra) [Entry date 11/09/95]

11/7/95 – LODGED jgmt submitted by plaintiff (FWD TO CRD) (dmjr) [Entry date 11/14/95]

11/7/95 – LODGED/PROPOSED Order (FWD TO CRD) (dmjr) [Entry date 11/14/95]

11/7/95 – LODGED/PROPOSED Order (FWD TO CRD) (dmjr) [Entry date 11/14/95]

11/13/95 37 OBJECTIONS by defendant to [35-2], to [33-1] (dmjr) [Entry date 11/16/95]

11/13/95 38 MEMORANDUM by defendant in support of objection [37-1] (dmjr) [Entry date 11/16/95]

1/16/95 [sic] 39 NOTICE OF APPEAL by defendant Dept of Industrial, defendant Div Labor Standards, defendant Rosa Frazier, defendant Roger Miller, defendant Daniel Dellarocca, defendant Lloyd W Aubry Jr, defendant Victoria Bradshaw to 9th C/A from Dist. Court jgm & ord file 11/7/95. (cc: Thomas S. Kerrigan, Levin, Stein, Chyten & Schneider.) Fee: Paid (dl)

1/16/95 [sic] 40 Representation Statement appeal [39-1] (dl)

1/16/95 [sic] 41 EX PARTE APPLICATION by defendant for ord short ti to mot for stay & modification of inj pending appeal (dmjr) [Entry date 11/27/95]

1/16/95 [sic] – LODGED/PROPOSED Order (FWD TO CRD) (dmjr) [Entry date 11/27/95]

11/16/95 42 PROOF OF SERVICE by defendant of applic to short ti on (see srv list) on 11/15/95 by fax (dmjr) [Entry date 11/27/95]

11/16/95 43 OBJECTIONS by plaintiff to [41-1] (dmjr) [Entry date 11/27/95]

11/20/95 44 NOTICE OF MOTION AND MOTION by defendant to stay & modify inj pending appeal; motion hearing set for 10:00 12/18/95 (dmjr) [Entry date 11/27/95]

11/20/95 45 ORDER by Judge Manuel L. Real denying application [41-1] (dmjr) [Entry date 11/27/95]

11/20/95 46 RESPONSE by plaintiff to obj to ord granting mot for S/J & jgmt (dmjr) [Entry date 11/27/95]

* * *

12/7/95 54 NOTICE by defendants of issuance of stay of jgm (dh) [Entry date 12/13/95]

12/11/95 55 Opp by plaintiff G & G Fire Sprinkler to motion to stay & modify inj pending appeal [44-1] (dh) [Entry date 12/13/95]

12/11/95 56 Reply memo P&A by plaintiff G & G Fire Sprinkler in suppt of motion for attorney fees [48-1] (dh) [Entry date 12/13/95]

* * *

12/12/95 58 Amended Opp by plaintiff G & G Fire Sprinkler to motion to stay & modify inj

pending appeal [44-1] (dh) [Entry date 12/15/95]

12/13/95 57 Memo P&A in reply by defendant to opp to motion to stay & modify inj pending appeal [44-1] (dh) [Entry date 12/15/95]

12/18/95 59 MINUTES: granting motion for attorney fees [48-1], denying motion to stay & modify inj pending appeal [44-1] by Judge Manuel L. Real CR: L LeBlanc (dmjr) [Entry date 12/26/95]

12/21/95 60 OBJECTIONS by defendant to [59-1] (dmjr) [Entry date 01/02/96]

12/26/95 – LODGED cc 9th c/a ord: Applnts' mot to stay dist crt's declaratory & injunctive jgm ent on 11/9/95 is den. (pjap) [Entry date 01/19/96]

* * *

12/2/96 63 ORDER by Judge Manuel L. Real denying motion to stay & modify inj pending appeal [44-1]. (ENT 1-4-96) mldcpys/ntc. (ab) [Entry date 01/04/96]

12/16/96 – LODGED 9th c/a ord, mot for recons fld on 1/5/96 raises issues that warrant a response. Accordingly, appllee shll file & serve a response w/i 14 dys of dte of this ord. Dist crt's jgm ent on 11/9/95 is temp stayed pndng resolution of applnt's mot for recons. (fvap)

12/22/96 64 NOTICE by defendants of issuance of temp stay of jgm (pj) [Entry date 01/24/96]

12/30/96 65 NOTICE OF APPEAL by Victoria Bradshaw, Lloyd W. Aubry, Jr., Dnaiel

[sic] Dellarocca, Rober [sic] Miller, Rosa Frazier, Division of Labor Standards Inforcement, [sic] and Department of Industrial Relations to 9th C/A from Dist. Court ord ent on 1/4/96. (cc: Thomas Kerrigan: Levin, Stein, Chyten & Schneider). Fee: Paid. (app)

* * *

Ninth Circuit Court of Appeals

* * *

11/21/95 Filed Appellant Victoria Bradshaw, Lloyd W. Aubry emergency motion to stay injunction order pending this appeal (CIVATT) [95-56639] served on 11/21/95 [2901572] (Hard copies recvd on 11/22/95) (wp) [95-56639]

* * *

11/27/95 Filed faxed copy of aple's opposition to emergency mcn; memorandum of points and authorities; declaration; served on 11/27/95. (CIVATT) [2901572-1] [95-56639] (rc) [95-56639]

11/29/95 Filed order CIVATT (Stephen R. REINHARDT,): The district court's judgment entered on 11/9/95 is temporarily STAYED in order to permit the motions panel to review aplts' emergency motion to stay filed on 11/21/95. (PHONED OUT BY SH/CIVATT) [95-56639] (hh) [95-56639]

* * *

1/5/96 Filed Appellants' motion for reconsideration or order of 12/21/95, denying stay on appeal; declaration of Thomas S. Kerrigan; served on 1/5/96 (to CIVATT) [2926747] [95-56639] (hh) [95-56639]

1/5/96 Received Appellants' motion for enlargement of time to move for reconsideration of order denying stay on appeal; declaration of Thomas S. Kerrigan; served on 1/5/96 (not needed, motion for recon timely) [2926752] [95-56639] (hh) [95-56639]

1/10/96 Filed Appellants' notice of priority rehearing and/or submission date; served on 1/8/96 (to MOATT per promo) [2929378] [95-56639] (hh) [95-56639]

1/16/96 Filed order (Joseph T. SNEED, Michael D. HAWKINS,): The motion for reconsideration filed on 1/5/96 raises issues that warrant a response. See 9th Cir.R. 27-10. Accordingly, aple shall file and serve a response within 14 days of the date of this order. The dc's judgment entered on 11/9/95 is TEMPORARILY STAYED pending resolution of aplts' motion for reconsideration. (PHONED OUT 1:14) [95-56639] (hh) [95-56639]

1/30/96 Filed Appellee G & G Fire Sprinkler's opposition to defts' motion for reconsideration of order of 12/21/95; memorandum of points and authorities; declaration of Stephen A. Seideman; served on 1/29/96 (to MOATT) [95-56639] (hh) [95-56639]

2/1/96 Filed Appellants' (faxed) motion for leave to file reply to opposition to motion for reconsideration; declaration of Thomas S. Kerrigan; served on 2/1/96 (to MOATT) (ORIG. REC'D 2/2/96 [2942648] [95-56639] (hh) [95-56639]

2/2/96 Filed Appellee G & G Fire Sprinkler's opposition to aplts' motion for leave to file reply to opposition to motion for reconsideration; served on 2/1/96 (to MOATT) [95-56639] (hh) [95-56639]

2/8/96 Filed order MOATT (SH) Aplts' unopposed motion to expedite this appeal is GRANTED. Aplts' opening brief and excerpts of record are due 2/26/96; aple's brief is due 3/25/96; the optional reply brief is due within 14 days

after service of aple's brief. The clerk shall not grant an ext of time absent extraordinary and compelling circumstances. 9th Cir.R. 31-2:3. The clerk shall calendar this case for May, 1996. [95-56639] (hh) [95-56639]

* * *

2/13/96 Filed order MOATT (Joseph T. SNEED, Michael D. HAWKINS,): Aplts' motion for reconsideration is GRANTED. The dc's judgment entered on 11/9/95 is STAYED pending appeal. Aplt's "motion for leave to file reply to opposition to motion for reconsideration" is DENIED as moot. [95-56639] (hh) [95-56639]

2/26/96 Filed original and 15 copies Appellants' opening brief (Informal: n) 32 pages and five excerpts of record in 1 volume; served on 2/23/96 [95-56639] (hh) [95-56639]

2/27/96 Filed Aple G & G Fire Sprinkler's motion for reconsideration of court's order dated 2/13/96; served on 2/26/96 (to MOATT) [2958385] (hh) [95-56639]

* * *

3/7/96 Filed order MOATT (Joseph T. SNEED, Michael D. HAWKINS,): Aple's motion to reconsider this court's 2/13/96 order is DENIED. [95-56639] (hh) [95-56639]

3/11/96 CALENDARED: Pasadena May 7, 1996 9:00 a.m. Courtroom 1 [95-56639] (dd) [95-56639]

3/27/96 Filed original and 15 copies Appellee G & G Fire Sprinkler's brief, 40 pages, served on 3/25/96 (minor defcy: no stmt of rel cases) Notified counsel. [95-56639] record on appeal due 4/15/96; (hh) [95-56639]

* * *

4/9/96 Filed original and 15 copies appellant's reply brief, (Informal: n) 10 pages; served on 4/8/96 [95-56639] (hh) [95-56639]

* * *

5/7/96 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS [95-56639] (jhc) [95-56639]

5/10/96 Received aple G & G Fire Sprinkler's letter dated 5/6/96 re: additional citations. (to PANEL) [95-56639] (hh) [95-56639]

8/27/97 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): Appeal no. 96-55194 is consolidated with appeal no. 95-56639 for purposes of disposition. Appeal no. 96-55194 is submitted on the briefs as of the filed date of this order. (parties phoned) [96-55194] (em) [96-55194]

* * *

2/3/98 FILED OPINION: AFFIRMED IN PART, REVERSED AND REMNDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published, Stephen R. REINHARDT; Alex KOZINSKI, dissenting; Michael D. HAWKINS, author.) FILED AND ENTERED JUDGMENT. [95-56639] (em) [95-56639]

2/17/98 [3395835] Filed original and 40 copies defts-aplts' petition for rehearing with suggestion for rehearing en banc 13 p.pages, served on 2/13/98 PANEL AND ACTIVE JUDGDES [sic] [95-56639] (em) [95-56639]

* * *

2/18/98 Filed State Building and Construction Trades Council of California et al 's motion to become amicus curiae ; served on 2/17/98 [3396705] PANEL (w/ copies of Petition for Rehearing en banc) [95-56639, 96-55194] (em) [95-56639 96-55194]

2/18/98 [3396726] Received original and 40 copies Amicus State Building brief in support of petition for rehearing with suggestion for rehearing en banc; (Motion pending); served 2/17/98 COPIES TO PANEL ONLY. (em) [95-56639 96-55194]

* * *

4/1/98 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): The motion of State Building and Construction Trade of California, etc. for leave to file brief Amici Curiae in support of Petition for Rehearing and Suggestion for Rehearing en banc is granted. The brief received by this court on 2/18/98 is ordered filed. The panel grants rehearing. Rehearing is scheduled for 6/16/98 at 11:00 am in Pasadena, California. [95-56639] (em) [95-56639]

* * *

4/14/98 Filed Amicus State Building in 95-56639's motion for leave to participate in oral argument (95-56639, 95-55194] served on 4/8/98 [3432275] FAXED PANEL (em) [95-56639 95-55194]

4/21/98 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): The motion of Amici Curiae The State Building

and Construction Trades Council of California AFL-CIO etc. for leave to participate in oral argument is granted. Aple and aplts shall each have 20 minutes to present their arguments, and amici shall have 10 minutes. (phoned out) [95-56639] (em) [95-56639]

* * *

5/6/98 Received orig. 06 copies G & G Fire Sprinker in 95-56639's brief in opposition of petition for rehearing and brief of amicus curiae; of 30 pages; with one-volume appendix to aple's brief; served on 5/5/98 deficient: motion pending (FEDEX TO PANEL) [95-56639] (em) [95-56639]

* * *

5/28/98 Filed original and 4 copies appellee G & G Fire Sprinkler in 95-56639's 30 pages brief in opposition to petition for rehearing and brief of amicus; with one volume of appendix; served on 5/5/98 (PANEL ALREADY SERVED) [95-56639] (em) [95-56639]

5/16/98 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS [95-56639] (rmw) [95-56639]

9/10/98 Filed order and amended opinion. The opinion filed on 2/3/98 is amended as follows: (SEE CASE FILE) . . . AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Aple G & G Fire Sprinkers. (Judges Stephen R. REINHARDT, Alex KOZINSKI dissenting, Michael D. HAWKINS, aut.) (Orig. opinion id: [3387125-1] [95-56639, 95-55194] (em) [95-56639 96-55194]

* * *

9/25/98 [3533632] Filed original and 40 copies deft-aplts in 95-56639 petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 9/24/98 PANEL AND ACTIVE JUDGES [95-56639] (em) [95-56639]

10/28/98 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [95-56639] (em) [95-56639]

11/5/98 MANDATE ISSUED/COSTS TAXED [95-56639, 96-55194] (jjf) [95-56639 96-55194]

2/1/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1204 filed on 1/29/99. [95-56639] (em) [95-56639]

4/22/99 Received notice from Supreme Court, petition for certiorari GRANTED on 4/19/99. Supreme Court No. 98-1204 (See also next entry;) FAXED PANEL (em) [95-56639, 96-55194]

4/22/99 Received copy of Supreme Court opinion dated 4/19/99 re: judgment vacated and remanded to USCA (Note: notice of granting of cert and judgment were in a letter dtd 4/19/99 from U.S. Supreme Court) FAXED PANEL [95-56639, 96-55194]

5/24/99 Filed Supreme Court judgment; filed and entered in the Supreme Court on 4/19/99: vacated with costs (Bradshaw to recover $300 costs from G & G Sprinklers) and remanded to USCA. (PANEL) [95-56639, 95-55194] (em) [95-55639 96-55194]

5/25/99 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): Within 21 days of filed date of this order, the parties shall file simultaneous letter briefs, not to exceed ten (10) pages, explaining why, in light of the Supreme Court's decision in American Mfrs. Mutt. Ins. Co. v. Sullivan US ___ 119 S. Ct. 977 (3/3/99), and its remand order to this court, this matter should or should not be remanded to the USDC with instructions to dismiss pltf's complaint with prejudice, (phoned out) [95-56639, 96-55194] (em) [95-56639 96-55194]

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as	CIVIL NO. 95-4839 COMPLAINT FOR: 1. DECLARATORY RELIEF (UNCONSTITUTIONAL APPLICATION OF STATE LAWS) 42 U.S.C. §1983, 28 U.S.C. §2201 2. DECLARATORY RELIEF (FACIAL UNCONSTITUTIONALITY OF STATE LAWS) 3. INJUNCTION 42 U.S.C. §1983 28 U.S.C. §2202 AND DEMAND FOR TRIAL BY JURY

Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; and Does 1 through 20, Defendants.	(Filed Jul. 21, 1995)

Plaintiff, G & G FIRE SPRINKLERS, INC., ("Plaintiff") alleges:

FIRST CLAIM FOR RELIEF

(Declaratory Relief)

1. Jurisdiction of this action is conferred on this United States District Court by the provisions of 42 U.S.C. §1983, 28 U.S.C. §1343(a)(4), and 28 U.S.C. §2201-2202 inasmuch as this action is to redress a deprivation of civil and constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by persons acting under color of state law, to secure a declaration of rights to an actual controversy concerning the unconstitutional application of certain California Labor Code provisions to Plaintiff by Defendants, and Plaintiff's assertions concerning the facial unconstitutionality of those provisions, and to restrain and enjoin Defendants from enforcing the unconstitutional provisions in the future.

2. Venue of this action is proper in this Court under the provisions of 28 U.S.C. §1391(b) inasmuch as Defendants, or some of them, are either residents of or maintain

official offices and places of business within the judicial district of this Court, the United States District Court, Central District of California. Further, Plaintiff conducts business within the county of Los Angeles, California, within this judicial district, and Defendants' conduct alleged herein has affected Plaintiff at its offices and its construction projects located within the judicial district of this Court.

3. Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, which does business in, among other places, Los Angeles, California, County of Los Angeles, and with its principal place of business in Culver City, County of Los Angeles, California. Plaintiff is now, and at all times herein mentioned has been, engaged in business as a fire protection contractor duly licensed under the laws of the State of California.

4. (a) Defendant VICTORIA BRADSHAW ("BRADSHAW") is, and at all times herein mentioned has been, Chief of the Division of Labor Standards Enforcement ("DLSE"), (also known as the Labor Commissioner) Department of Industrial Relations, State of California, and, as such, is the public officer of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws (*California Labor Code* §§ 1720-1815).

(b) Defendant BRADSHAW is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

5. (a) Defendant LLOYD W. AUBRY, JR. ("AUBRY") is, and at all times herein mentioned has been, Director of the Department of Industrial Relations, State of California, and as such is the public executive officer of the State of California responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including the "prevailing wage and apprenticeship" laws.

(b) Defendant AUBRY is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of U.S.C. §1983.

6. (a) Defendant DANIEL DELLAROCCA ("DELLAROCCA") is, and at all times herein mentioned has been, a Deputy Labor Commissioner of the Division of Labor Standards Enforcement (hereinafter "DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant DELLAROCCA is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

7. (a) Defendant ROGER MILLER ("MILLER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is

one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant MILLER is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

8. (a) Defendant ROSA FRAZIER ("FRAZIER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant FRAZIER is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

9. Defendants MILLER, FRAZIER, BRADSHAW and AUBRY, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

10. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names.

11. Plaintiff has performed work both as a subcontractor and prime contractor on various public works

projects which are subject to the prevailing wage requirements set forth in the California Labor Code.

12. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor.

13. Defendants, acting under color of California Labor Code §§ 1727-1731, 1774, 1775, 1777.5 and 1815, issued Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the prime contracts on public works projects on account of the alleged failure of Plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and, to have otherwise complied with the prevailing wage and apprenticeship laws.

14. Prior to issuing the Notices to Withhold mentioned in Paragraph 13, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due.

15. The amount presently withheld as a result of such notices is more than $100,000.

16. The awarding bodies continue to withhold not less than $100,000 from the Prime Contractors who employed Plaintiff, on account of the Notices.

17. None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors

either a pre-deprivation or post-deprivation hearing on the claims involved.

18. California Labor Code §1729 provides:

> "1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The Prime Contractors for the Projects have withheld from Plaintiff not less than $100,000 due to the withholding from said Prime Contractors of monies due to the Notices.

19. Defendants stated to Plaintiff that there is no right to a pre-deprivation hearing. Defendants stated to Plaintiff that Labor Code §1732 provides that a lawsuit by the contractor or his assignee pursuant to Labor Code §1731 et seq. is the exclusive remedy of the contractor or his assignee with regard to wages and/or penalties withheld. Plaintiff has been deprived of the sum of not less than $100,000 in earned progress payments due it under its contracts for the Projects.

20. There was no hearing held prior to the issuance of any of the Notices. There is no procedure for a prompt post-withholding hearing with regard to such notices to withhold. There is no requirement that Defendants ever carry any burden to justify the issuance of a notice to withhold. There is no procedure to protect against the

issuance of notices to withhold in an excessive amount, resulting in withholding of excessive amounts of money.

21. The issuances of the notices to withhold by DLSE are not necessary to the implementation or enforcement of the prevailing wage laws. There are no emergency circumstances which necessitate the issuance of notices to withhold without a hearing and/or other reasonable and appropriate procedures.

22. The notices to withhold issued by the DLSE on account of alleged violations by Plaintiff at the above mentioned projects are wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably.

23. The issuance of the notices to withhold caused Plaintiff to be deprived of property in the form of substantial sums of money as the statutory provisions purported to be enforced by DLSE provide that upon the withholding of money from a prime contract by an awarding body, the contractor may withhold said money from the subcontractor. Thus, the notices to withhold issued by the DLSE were intended to, and did, cause Plaintiff to suffer a deprivation of property.

24. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the U.S. Constitution.

25. There is now existing between Plaintiff on the one hand, and Defendants, and each of them, on the other hand, an actual, justiciable controversy with respect to which Plaintiff is entitled to have a declaration of its

rights and equitable relief, because of the facts, conditions, and circumstances set forth above.

26. (a) Plaintiff is entitled to a declaration of its rights declaring the acts of Defendants, and each of them, have been and are invalid, illegal, and in deprivation of Plaintiff's due process and property rights guaranteed by the Section 1 of the Fourteenth Amendment to the Constitution of the United Sates, [sic] that the Notices are invalid and of no legal effect.

(b) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and to prosecute this action, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. §1988.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

(Facial Unconstitutionality of State Laws)

27. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 26 of the First Claim for Relief as though fully set forth herein.

28. (a) Insofar as is relevant herein, *California Labor Code* §§1727, 1730, 1732, 1733, and 1775, provide:

§1727. Withholding of Forfeited Sums

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been

forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body. (1937 ch. 90, 1431, 1992 ch. 1342)"

§1730. Transfer of Wages and Penalties to Labor Commissioner

"Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job. (1992 ch. 1342)"

§1733. Recovery of Wages and Penalties – Suit

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this

section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action. (1937 ch. 90, 1957 ch. 398, 1988 ch. 160, 1992 ch. 1342)"

§1775. Payment Less Than Stipulated, Rate – Penalty

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract, by him or her or by any subcontractor under him or her. The amount of this penalty shall be detemined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part."

(b) On their face, Sections 1727, 1729, 1730, 1732, 1733 and 1775, deny and deprive persons of their property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said Sections authorize the deprivation of property without notice or hearing, and provide for the imposition of penalties and forfeitures without notice or hearing.

(c) Defendants presently maintain a policy and practice pursuant to *California Labor Code* §§1720-1815 which authorizes the withholding of monies from Contractors and Subcontractors who perform services on Public Works Projects, as well as the imposition of penalties and forfeitures, without providing such Contractors and Subcontractors any prior notice or prior hearing for alleged violations of said Sections.

(d) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. §1988.

THIRD CLAIM FOR RELIEF

(Injunction)

29. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 28 above as though fully set forth herein.

30. The actions and conduct of Defendants have caused Plaintiff to suffer great and irreparable injury and unless the Court issues relief by way of a Temporary Restraining Order, Preliminary and Permanent Injunction, Plaintiff and other contractors will suffer great and irreparable injury in that Plaintiff and other contractors will (1) be deprived of its property without due process of law; (2) be liable for civil penalties and back wage forfeitures; (3) be required to expend time and money; and (4) be exposed to unfavorable publicity which will injure its reputation as a reputable construction firm resulting in loss of business.

31. Plaintiff does not have an adequate remedy at law because (1) the pecuniary damages which it might suffer are presently difficult or impossible to fully ascertain; and (2) the irreparable injury to Plaintiff's reputation cannot be fully compensated by money damages. Further, since the provisions of the California Labor Code set forth herein are unconstitutional on their face, as well as in application to Plaintiff, Defendants' conduct in continuing to maintain and enforce such unconstitutional provisions entitles Plaintiff to injunctive relief to enjoin such provisions.

32. Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorneys' fees pursuant to the provisions of 42 U.S.C. §1988.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1. **ON ITS FIRST CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that as applied to Plaintiff, *California Labor Code* §§1720-1815 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Notices are invalid and of no legal effect;

   b. For Costs of suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

2. **ON ITS SECOND CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that on their face, *California Labor Code* §§1727, 1729, 1730, 1732, 1733 and 1775 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

3. **ON ITS THIRD CLAIM FOR RELIEF:**

   a. For a Temporary Restraining Order, Preliminary and Permanent Injunction enjoining Defendants, and each of them, and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with

them, including representatives of the awarding bodies from enforcing, or threatening to enforce, the provisions of *California Labor Code* §§1727, 1729 or 1775 against Plaintiff, or any other person, with regard to any "public works" project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person;

b. For Costs of Suit;

c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

d. For such other relief as is just and proper.

DATED: July 21, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Steven A. Seideman
Steven A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury.

DATED: July 21, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Steven A. Seideman
Steven A. Seideman, Esq.
Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and DOES 1 through 20, Defendants/Appellants.	CASE NO. 94-8542-ER NOTICE OF MOTION AND MOTION TO DISMISS [F.R.C.P. Rule 12] Date: September 25, 1995 Time: 10 a.m. Courtroom: No. 1 (Filed Aug. 16, 1995)

TO THE ABOVE-NAMED PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 25, 1995, at 10 a.m., or as soon thereafter as the matter can be heard, in Courtroom No. 1 of the HONORABLE EDWARD RAFEEDI, District Court Judge, located at 312 N. Spring Street, Los Angeles, California, defendants will move the Court for an order dismissing this case pursuant to Rule 12 of the Federal Rules of Civil Procedure.

The motion will be made on the grounds that the Complaint fails to state a claim upon which any relief can be granted and that Plaintiff has no standing to assert the challenges contained in its complaint.

The motion will be based on this Notice of Motion, the accompanying memorandum of points and authorities, and the pleadings, files and records in this action.

DATED: August 16, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for State Defendants

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and DOES 1 through 20, Defendant/Appellant.	CASE NO. 94-8542-R MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS Date: September 25, 1995 Time: 10 a.m. Courtroom: No. 1

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
A. Factual Background	1
II. ARGUMENT	3
A. The Right Of The State To Prescribe The Conditions Upon Which It Will Permit Its Public Works To Be Performed May Not Be Questioned	3
B. Plaintiff's Injuries, Consisting Solely of Indirect Adverse Effects oF Governmental Action, Are Not Actionable	4
C. The Due Process Clause Does Not Guaratee [sic] Plaintiff A Pre-Deprivation Hearing In This Case	8
D. The California Public Works Statutory Scheme Does Recognize A Contractual Relationship Between The Awarding Body And The Prime Contractor But Does Not Recognize Privity Of Contract With Subcontractors, And, Thus, State Law Does Not Recognize A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor	10
E. The California Public Works Law Requires That Any Action To Recover Sums Held By An Awarding Agency Must Be Brought By The Contractor Or His Assignee	11

	Page
F. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts	13
G. Plaintiffs Lack Standing To Bring This Action On Behalf Of The Prime Contractors Who Are In Privity Of Contract With The Awarding Bodies	16
1. Even If The Plaintiff Did Have Standing On Behalf Of The Prime Contractors To Question The Actions Of The State In Ordering The Withholding Of Unpaid Wages, The Attack On Constitutional Grounds Must Fail	18
H. The Individual Defendants Are Immune From Suit In This Action	19
III. CONCLUSION	20

TABLE OF CASES AND AUTHORITIES

	Page
Anderson v. Creighton, 483 U.S. 635, 639-640, 107 S. Ct. 3034 (1987)	19
Atkin v. Kansas, 191 U.S. 207 (1903)	4
Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)	8
Cal-Pacific Materials Co. v. Redondo Beach City School District,	10, 11
Castaneda v. Department of Agriculture, 807 F 2, 1478, 1480 (9th Cir. 1987)	6
Ericson v. U.S., 976 f. 2D 1299, 1301 (9th Cir. 1992)	20
Fahey v. Mallonee, 332 U.S. 245, 255 (1947)	19

Foster v. Superior Court, 26 Cal.App.2d 230, 234..... 19

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) 14

Grove City College v. Bell, 687 F 2d, 684, 703 (3rd Cir. 1982) 7

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 277..... 19

LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985).....15, 17

Legal Tender Cases, 12 Wall. 457, 551..... 5

Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990)..... 13

Lusardi Construction Co. v. Aubry, (1992) 1 Cal.4th 976, 986..... 15

Madonna v. State of California, (1957) 151 Cal.App.2d 836.....14, 19

Mathews v. Elridge, 424 U.S. 319, 333 (1976)..... 8

Metropolitan Water District v. Whisett, (1932) 215 Cal. 400..... 4

Morrissey v. Brewer, 408 U.S. 471, 481 (1972)..... 9

Nuclear Transport & Storage, Inc. v. United States, 890 F. 2d 1348, 1354 (6th Cir. 1989)..... 7

O. G. Sansone v. Department of Transportation, (1976) 55 Cal.App.3d 434, 455 .....3, 15

O'Bannon v. Town Court, 447 U.S. 773, 788-789, 100 S. Ct. 2467 (1980).....6, 7

Powers v. Ohio, 499 U.S. 400, 413 (1991) 17

Purdy & Fitzpatrick v. State of California, (1969) 71 Cal.2d 566, 586..... 12

Russell v. Landrieu, 621 F.2d 1037, 1040 (9th Cir. 1980)..... 13

Singleton v. Wulff, 428 U.S. 106 (1976)..... 17

Tracy v. McIntyre, 29 Cal.App.2d 145 19

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472.....16, 17

TABLE OF STATUTES

Page

California Labor Code §§ 1720-1815..... 2

California Labor Code § 1727.....14, 15

California Labor Code § 1729..... 14

California Labor Code § 1730.....12, 14, 15

California Labor Code § 1731..... 12

California Labor Code § 1732.....12, 14, 15

California Labor Code § 1733..... 11, 12, 14, 15

California Labor Code § 1771..... 2

California Labor Code § 1773..... 10

California Labor Code § 1773.2 3

California Labor Code § 1773.4 3

California Labor Code § 1775 .. 2, 3, 11, 12, 13, 14, 15, 16

Labor Code § 1775 .....

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and Does 1 through 20, Defendant/Appellant	CASE NO. 94-8542-R MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS Date: September 25, 1995 Time: 10 a.m. Courtroom: No. 1

I. INTRODUCTION

A. Factual Background

Plaintiff G&G Fire Sprinklers, Inc. (hereinafter "G&G"), performed work as a subcontractor on certain State of California public work projects. The Division of Labor Standards Enforcement, the California agency mandated to enforce the prevailing wage requirements of the California Public Works law (California Labor Code §§ 1720-1815) conducted an investigation concerning the payment of prevailing wages on the above projects and issued "Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the *prime contracts* of the Projects on account of the alleged failure of G&G to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws." (Complaint, 3; 13:18-26) (Emphasis added) As a result of the Notices directed to the awarding bodies, those awarding bodies withheld "not less than $100,000," from payments to the Prime Contractor (Complaint, 16) As a result of the above action, the "*Prime Contractors* for the Projects have withheld from Plaintiff not less than $100,000 due to the withholding from said *Prime Contractors* of monies due to the Notices." (Complaint, 18: 22-24).

Plaintiff alleges that "None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation hearing on the claims involved." (Complaint, 17).

To summarize, G&G has contracted with prime contractors to perform work on public work projects in the State of California. Because of the failure of G&G to pay the prevailing wage to the workmen it employed as required by Labor Code §§ 1771 and 1775, the public agency which awarded the public work contract withheld from the prime contractors with which the awarding body was contracting the difference between the wages paid and the prevailing wages due from the sums due under the contract with the awarding body. G&G, as a subcontractor of the prime contractor, is not in privity of contract with the awarding body. Thus, the sum withheld by the awarding body was not owed to G&G, but was withheld from sums which might have been due under the contract to the prime contractors.

The California prevailing wage law provides for notice with respect to the determination of the rate of prevailing wages to be paid on public works projects in the state. (Labor Code § 1773.2) The statutory scheme further provides a procedure for contesting the Director's determination of the prevailing rate of wages. (Labor Code § 1773.4) Thereafter, the prime contractor submits a bid based on the Director's determination with respect to prevailing wages to be paid, and the contract, subsequently awarded for said public work contains notice of the forfeiture to be made by the contractor if either he or his subcontractor fails to comply with the contractural provisions relating to the payment of prevailing wages. (Labor Code § 1775) Thus, the contractor cannot claim that he lacked notice of, or an opportunity to contest, the prevailing wage provision as determined by the Director.

O. G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434, 455.

II. ARGUMENT

A. The Right Of The State To Prescribe The Conditions Upon Which It Will Permit Its Public Works To Be Performed May Not Be Questioned

The question of the right of the state to dictate the terms upon which it chooses to do business was addressed many years ago and is settled law at this point. The United States Supreme Court in the case of *Atkin v. Kansas* 191 U.S. 207 (1903) concluded:

> "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that regard. Regulations on this subject suggest only considerations of public policy. *And with such considerations the courts have no concern.*" *Id.*, 191 U.S. at 222-223.

In 1932 the California Supreme Court had occasion to pass upon the constitutionality of the prevailing wage law in California and, relying heavily on the *Atkin* case, found that the law passed muster. *Metropolitan Water Dist.*

v. Whisett (1932) 215 Cal. 400. Again, in 1957, the California Appellate courts revisited the question in the case of *Madonna v. State of California* (1957) 151 Cal.App.2d 836, and, again, found the statutory scheme met the Fourteenth Amendment Due Process requirements.

B. Plaintiff's Injuries, Consisting Solely Of Indirect Adverse Effects of Governmental Action, Are Not Actionable

As pointed out hereinabove, the allegations of the Complaint in this case specify no direct action by Defendants against Plaintiff. On the contrary, it is indisputable from these allegations that the only action taken by Defendants, the issuance of the various notices (See Complaint, Paragraph 13), was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies from plaintiff for work performed under their subcontracts. By filing this action plaintiff is, in effect, trying to interject itself in a dispute between the prime contractors and the State of California. Defendants accordingly contend that these allegations, standing alone, are insufficient as a matter of law to state a claim for deprivation of due process.

More importantly, the Supreme Court has long held that facts such as those disclosed in the Complaint in this case cannot constitute a basis for relief under the due process clause.

"Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the *indirect adverse effects* of

governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S.Ct. 2467 (1980) (Emphasis added).

In *O'Bannon* a group of patients sued to prevent a state from revocation of reimbursement of medical expenses to a medical facility where the patients lived without affording members of the group a hearing. The revocation, if upheld, would have required them to move to another facility in order to continue to be eligible for medical benefits. While they were all clearly injured by the impending revocation, the Supreme Court held that the detriment the patients experienced was only *indirect* because the action of the state was against the facility and not directly against them. Since they were only indirectly impacted, they could not claim a deprivation of due process because they were denied a hearing. As the Supreme Court took pains to point out, these patients' rights, if any, were against the hospital and not against the public entity.

This fundamental principle of constitutional law, that indirect deprivations of property rights are nonactionable, has been given wide ranging application in a variety of factual situations.

In *Castaneda v. U.S. Department of Agriculture*, 807 F. 2d 1478, 1480 (9th Cir. 1987), a store manager sued the Department of Agriculture because that agency had closed the store where he worked as a result of food stamp violations, causing him to lose his job. He claimed he had the right to a hearing prior to such action being taken. Relying on *O'Bannon*, the Ninth Circuit held that Castaneda had no due process claim because he was only indirectly adversely affected by the action of the Department of Agriculture.

In *Grove City College v. Bell*, 687 F. 2d 684, 704 (3rd Cir. 1982), a college refused to execute certain federal forms required under statutes administered by the United States Department of Education, causing that agency to revoke all student loans and aid at the college without affording a hearing to the affected students. Citing *O'Bannon*, the court held that the students had no claim for violation of due process because they were only indirectly affected by the Department of Education's action.

In *Nuclear Transport & Storage, Inc. v. United States*, 890 F. 2d 1348, 1354 (6th Cir. 1989), a radioactive waste storage company was impacted when the U.S. Department of Energy began offering free storage facilities to its customers without granting a hearing prior to taking this action. The court held the company was only indirectly impacted under the reasoning of *O'Bannon* and could therefore state no claim for violation of its due process rights.

There can be no logical distinction drawn between the position of the aggrieved parties in these cases and the position of plaintiff here. The State of California acted

to enforce its contractual and statutory rights solely with respect to the prime contractors. While plaintiff has undoubtedly suffered some initial detriment as a result of these prime contractors' withholding of funds, its rights, if any, are against the prime contractor and not these defendants. Any adverse impact which plaintiff has suffered is clearly indirect within the meaning of *O'Bannon* and its progeny and cannot give rise to a claim of deprivation of due process under the reasoning of those cases.

Based on the facts of this case, as alleged in the Complaint, it is apparent that plaintiff is, at best, only indirectly impacted by the action of defendants. It accordingly cannot state a claim upon which any relief can be granted and this action should accordingly be dismissed.

C. The Due Process Clause Does Not Guarantee Plaintiff A Predeprivation Hearing In This Case

The gravamen of the principle allegations of the Complaint is that plaintiff was denied a pre-deprivation hearing by defendants in violation of their due process rights (Complaint, 17). This contention presumes that plaintiff necessarily possessed a constitutional right to a pre-deprivation hearing, a presumption that is unwarranted in light of present day law.

The extent to which the due process clause mandates a hearing prior to the deprivation of property rights was carefully considered by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 319, 333 (1976). That Court made clear that the question of whether a predeprivation hearing

must be afforded consistent with principles of due process was not a black and white matter. Reviewing the cases on this subject, the Court stated:

"These decisions underscore the truism that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected." 424 U.S. at p. 334.

The Court pointed out that there were three factors which must be balanced to determine the need, if any, for a predeprivation hearing: 1. the private interest to be affected; 2. the risk of an erroneous deprivation of interest through the procedures used and the probably [sic] value of additional procedural safeguards; and 3. the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

424 U.S. at pp. 332-335.

Taking these factors in order, we note that the first factor, the private interest to be affected, is unquestionably an interest, as pointed out hereinabove, that is only indirectly impacted by the State of California, inasmuch as the Defendants' action was directed only to the prime contractors and not to plaintiff. Despite some superfluous references in the Complaint to the rights of the prime

contractors (see, e.g., Paragraph 17), plaintiff cannot stand in the shoes of these entities, entities that are not even before this court.

The interest of the State of California in preserving prevailing wage rates in public works contracts is treated more fully elsewhere in this memorandum. Suffice it to say at this point that Defendants' purposes in this area, including both the preservation of workers' economic rights and the prevention of unfair competition among competing contractors, is of compelling importance.

Under existing procedures, a prime contractor is empowered to bring suit against the contracting agency under California Labor Code Section 1773 for all wages and penalties alleged to have been improperly withheld. In view of the efficient processing of cases in the courts in Southern California through the ubiquitous fast track procedures, this constitutes a timely and appropriate means of review of State action in these cases. Such a remedy is consistent with enlightened concepts of due process.

Under the circumstances reflected in the allegations of the Complaint, it is apparent that the procedures afforded by Defendants for postdeprivation review by the courts of the validity of the withholding of wages and penalties is not violative of due process.

D. The California Public Works Statutory Scheme, Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity Of Contract With Subcontractors, and, Thus, State Law Does Not Recognize A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor

The California courts have consistently held that the right of a subcontractor to recover sums it alleges are due for work performed on a public works project is limited to the rights it has under the stop notice provisions of the California Civil Code. *Cal-Pacific Materials Co. v. Redondo Beach City School District* (1979) 94 Cal.App.3d 652, 655. The *Cal-Pacific* court described the doctrine of privity of contract and explained the remedies available to a subcontractor or materialman:

> "School District contracted with Willens [the prime contractor] and not with Cal-Pacific. Cal-Pacific sold its materials to Western States, Willen's subcontractor, and not to School District. Lack of privity thus precludes recovery by Cal-Pacific unless recovery is permitted because of the stop notice." *Cal-Pacific Materials, supra,* at 656.

In dealing with the prevailing wage statutes, privity of contract is required in order to recover sums "forfeited" by the prime contractor as a result of the failure of that contractor "or by any subcontractor under him or her[1]" to pay the prevailing wage. As described below, the statutory scheme provides only that the prime contractor

(or his assignee) has the right to recover the sums withheld *under the contract.*

B. The California Public Works Law Requires That Any Action To Recover Sums Held By An Awarding Agency Must Be Brought By The Contractor or His Assignee

California Labor Code § 1775 provides that the awarding body must insert in every public works contract a provision which requires the payment of prevailing wages and allows the withholding of wages and penalties in the event of a breach of that provision.

> California Labor Code § 1733 provides, *inter alia*: "Suit may be brought *by the contractor or his or her assignee* without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract . . . " (Emphasis added)

California Labor Code § 1732 provides that the time to bring an action "on the contract" to recover the penalties and wages shall be limited to 90 days and is *the exclusive remedy* of the *contractor or his assignee.* The California Supreme Court has stated that "Labor Code section 1732 provides that a contractor's 'exclusive remedy' for the recovery of penalties assessed under section 1850 shall consist of an action against the awarding body *of his contract* to perform public work under section 1731-1733." *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 586. (Emphasis added)

Again, the requirement under California law is that the prime contractor is contractually responsible for the payment of the prevailing wage (Labor Code § 1775). Failure of either the prime or his subcontractors to pay the prevailing wage is a breach of the prime contractor's contract with the awarding body. Thus, California law, not surprisingly, requires there must exist privity of contract (or an assignment of the contract right) in order to have standing to recover sums withheld from the contract price for breach of the contract occasioned by the failure of either the contractor or subcontractors under him to pay the prevailing wage. (Labor Code §§ 1730-1733) This requirement is certainly not unique. Common law contract concepts have always required privity in order to bring an action to enforce a contract.

Even the complaint filed by G&G in this action admits that the sums withheld by the awarding body were withheld from the prime contractor, not G&G. The funds were withheld from amounts which *may* have been due the prime contractors under the *contract*. Had insufficient sums been withheld from the prime contractor, the state agency mandated to enforce the prevailing wage law would have been required to bring an action against the prime contractor (not the subcontractor) to recover the wages.

G&G was not a party to the contract between the awarding body and the prime contractors and has no right to recover sums which might be due under that contract just as there is no provision in the prevailing wage law which would allow the state to recover the wages from the subcontractor. Thus, there was no "taking" from the plaintiff and the actions by the state are not

within the "zone of interest" protected by the Fourteenth Amendment. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, (1990)

In sum, there is no right of G&G to "entitlement . . . defined by existing rules or understandings that stem from . . . state law." *Russell v. Landrieu, supra*, 621 F.2d at 1040. Thus, G&G enjoys no "property interest" in the sums withheld.

C. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts

The constitutional provision defining the judicial power of the United States extends the power to cases arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.

> "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society. [sic] The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the

putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In this case, where the gravamen of G&G's action is an effort to have the provisions of the Labor Code dealing with the withholding of sums from the general or prime contractor declared unconstitutional as applied to plaintiff, there must be a deprivation of some right which inures to a contractor in G&G's position as a result of the actions by the state agency. But, as pointed out above, G&G has no right to the money withheld by the awarding body and, consequently, can suffer no "injury" attributable to the state or its agencies.

Again, in sum, what G&G's allegations fail to establish is that it has any standing to recover the monies withheld by the awarding body pursuant to the contract between the awarding body and the prime contractor – a contract which does not benefit or relate to G&G. Specifically, G&G asks that this court declare Code §§ 1727, 1729, 1730, 1732, 1733 and 1775 unconstitutional. But pertinent Labor Code sections cited above have no affect [sic] on subcontractors performing public works in California. The cited sections constitute the statutory scheme in California designed to enforce the prevailing wage law through withholding from sums due to *prime contractors under the contract* when they are contracting with awarding bodies. Pursuant to § 1727, for instance, "Deficiencies and penalties are to be withheld by the awarding body from sums due *under the contract*." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986. (Emphasis added) Labor Code §§ 1730 provides that the awarding body is to transfer all wages and penalties that have been withheld

pursuant to § 1727 (i.e., under the contract) to the Labor Commissioner. Labor Code § 1732 provides the time frame within which the prime contractor (or his assignee) must bring and [sic] action to recover the sums withheld. The action is to be "on the contract for alleged breach thereof in not making the payment" and this suit is "the exclusive remedy" of the contractor or his assignee. Section 1733 provides that the burden of proof is upon the "contractor or his or her assignee to establish his or her right to the wages and penalties withheld."

Under the clear language of the California Prevailing Wage law it is the contractor who bears liability for wage underpayments made by subcontractors. (Labor Code § 1775) This interpretation comports with case law. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, the prime contractor subcontracted a portion of a public works project to a subcontractor, who then subcontracted a portion of his work. Neither subcontractor paid the prevailing wage to its workers. The state withheld payment to the general contractor to cover the underpayment and the Court of Appeal concluded that this was proper:

> "Plaintiffs entered into a contractural agreement to the effect that they would comply with . . . section 1775 and that they would forfeit to the state $25 per day for each workman paid less than the prevailing wage by either plaintiffs or by their subcontractors, as well as pay to each workman the difference between the prevailing wage and the amount the workman had received. Thus, when [the] subcontractors . . . failed to pay prevailing wages to their workmen, plaintiffs became contractually liable to

pay the penalty to the state as well as to pay the wronged workmen the difference in wages." *Id.*, at 462-463.

D. Plaintiffs Lack Standing To Bring This Action On Behalf Of The Prime Contractors Who Are In Privity Of Contract With The Awarding Bodies

One of the elements of standing under Article III is that "the plaintiff must establish that the injury can be fairly traced to the Defendant's challenged conduct and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472; *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.1985).

In addition to the constitutional requirements of Article III there exist "prudential limitations" which must be met. Here, G&G must assert its own rights and can neither assert nor rely upon the interests of others. *Valley Forge Christian College, supra*, 454 U.S. at 472. In this case, the facts alleged by G&G indicate that the alleged "injury" to itself is "not redressable by a favorable decision," *Valley Forge Christian College, supra*, at 472; *LaDuke, supra*, 762 F.2d at 1323, for even in the unlikely event that this court were to find that the withholding from the prime contractor under the terms of its contract with the awarding body was violative of the Due Process Clause, there is no showing by G&G that the prime contractor would have paid the money over to G&G.

In addition, as the Supreme Court's discussion of third party rights in *Singleton v. Wulff*, 428 U.S. 106 (1976)

reveals, G&G must overcome the two-fold prohibition against assertion of third party rights. As the Court noted, such assertion should be the exception and not the rule. *Id.* at 114.

The Supreme Court has more recently addressed the issue of standing to protect the rights of third parties in the case of *Powers v. Ohio*, 499 U.S. 400, (1991). The *Powers* court first restated the long-standing rule: "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties." *Id.*, at 412. The Court then relied upon *Singleton, supra*, for the proposition that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter," *Powers, supra*, at 413, citing *Singleton, supra*. 428 U.S. at 115. The Court noted that in the case before it "there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons rights." *Powers, supra*, 499 U.S. at 413, and spoke of "this congruence of interests [which] makes it . . . appropriate for the defendant to raise the rights of the [third party]." *Id.*, at 414. The third party "right" which both *Powers* and *Singleton* chose to protect was a constitutionally protected right which the parties held, in common, with all citizens. The right of the juror to serve and the right of the defendant to have that juror serve were not in any way inconsistent.

Here, on the other hand, G&G seeks to represent the interests of prime contractors who have withheld "not less than $100,000.00" from G&G and who, incidentally,

have failed to provide G&G with an assignment necessary to recover any of this amount. The fact that these prime contractors did not make such an assignment is instructive for there appears to be a lack of a "congruence of interests" between G&G and the prime contractors such that G&G might no [sic] be a "motivated, effective advocate" of the rights of the prime contractors.

1. Even If The Plaintiff Had Standing On Behalf Of The Prime Contractors To Question The Actions Of The State In Ordering The Withholding of Unpaid Wages, The Attack On Constitutional Grounds Must Fail

Even if G&G were allowed to attack the constitutionality of the statute in the stead of the prime contractors, G&G would be in no better position than those it would then represent. There is little doubt that the prime contractors who entered into the contracts with the awarding bodies have benefitted from the fact that they did business with the state under the terms of the Act. These contractors would now be estopped to bring an action to test the constitutionality of the statutory scheme which allows the awarding body to withhold sums due under the contract. The admonition of the U.S. Supreme Court in the case of *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947) would be appropriate:

> "It is an elementary rule of constituional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions. The Court will not pass upon the constitutionality of a statute at the

> instance of one who has availed himself of its benefits.' "

See also *Foster v. Superior Court*, 26 Cal.App.2d 230, 234, *Tracy v. McIntyre*, 29 Cal.App.2d 145, and *Madonna v. State of California*, 151 Cal.App.2d 836.

E. The Individual Defendants Are Immune From Suit In This Action

Plaintiff has forborn from suing agencies of the State of California in this case and has named solely the following public officials: Victoria Bradshaw, as the Labor Commissioner, Lloyd W. Aubry, Jr., as the Director of the Department of Industrial Relations, Daniel Dellarocca, as a Deputy Labor Commissioner, Roger Miller, as a Deputy Labor Commissioner, and Rosa Frazier, as a Deputy Labor Commissioner. It is well settled that a qualified immunity shields public officials whose conduct "does not violate clearly statutory or constitutional rights of which a reasonable person must have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S.Ct. 3034 (1987); *Ericson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992).

The sole allegation against these officials is that they issued certain notices to awarding bodies contracting with the prime contractors regarding the failure to pay prevailing wage rates on the projects involved, doing so without affording plaintiff or its prime contractors a hearing (Complaint, 13 and 14).

Even if plaintiff could prevail on its aforementioned constitutionality contentions, it is apparent that these

officials were only performing their legislatively assigned duties in enforcing and implementing provisions of the California Labor Code and could have no reason to believe that these provisions were unconstitutional in any respect. The Complaint in this suit is clearly defective in this regard in that it contains no allegations that any of these offficials [sic] knowingly violated any statute or knowingly violated any of plaintiff's constitutional rights.

III. CONCLUSION

The withholding of wages and penalties under the Prevailing Wage Rate Act of which the plaintiffs complain was solely and totally from sums due the prime contractors, such withholding having been made as a result of a provision in the contract between the awarding body and the prime contractors. Plaintiffs are not in privity of contract and cannot complain of the actions taken under the contract. Further, even if the plaintiffs did have the standing to bring this action on behalf of the prime contractors, the withholding was not a violation of due process because plaintiff was only indirectly impacted by this action. Finally, Plaintiff has failed to overcome the presumption of immunity of public officials inasmuch as it has failed to allege that Defendants knowingly violated

its legal or constitutional rights in withholding funds from the prime contractors.

Dated: August 16, 1995

Respectfully submitted,

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ Thomas Kerrigan
THOMAS S. KERRIGAN
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and Does 1 through 20, Defendant/Appellant	CASE NO. 94-8542-R [Proposed] ORDER

The motion of defendants to dismiss plaintiff's complaint was regularly heard on the above date and time. Appearing as attorneys were Thomas S. Kerrigan for defendants, and Stephen A. Seideman for plaintiff.

After considering all papers filed in this action, and the argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Plaintiff's complaint be dismissed in its entirety.

DATED: _____

_____
EDWARD RAFEEDI
U. S. District Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as	CIVIL NO. 95-4839 E (BQRx) R FIRST AMENDED COMPLAINT FOR: 1: DECLARATORY RELIEF (UNCONSTITUTIONAL APPLICATION OF STATE LAWS) 42 U.S.C. §1983, 28 U.S.C. §2201 2. DECLARATORY RELIEF (FACIAL UNCONSTITUTIONALITY OF STATE LAWS) 3. INJUNCTION 42 U.S.C. §1983 28 U.S.C. §2202 AND DEMAND FOR TRIAL BY JURY

Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	

Plaintiff, G & G FIRE SPRINKLERS, INC., ("Plaintiff") alleges:

FIRST CLAIM FOR RELIEF

(Declaratory Relief)

1. Jurisdiction of this action is conferred on this United States District Court by the provisions of 42 U.S.C. §1983, 28 U.S.C. §1343(a)(4), and 28 U.S.C. §2201-2202 inasmuch as this action is to redress a deprivation of civil and constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by persons acting under color of state law, to secure a declaration of rights to an actual controversy concerning the unconstitutional application of certain California Labor Code provisions to Plaintiff by Defendants, and Plaintiff's assertions

concerning the facial unconstitutionality of those provisions, and to restrain and enjoin Defendants from enforcing the unconstitutional provisions in the future.

2. Venue of this action is proper in this Court under the provisions of 28 U.S.C. §1391(b) inasmuch as Defendants, or some of them, are either residents of or maintain official offices and places of business within the judicial district of this Court, the United States District Court, Central District of California. Further, Plaintiff conducts business within the county of Los Angeles, California, within this judicial district, and Defendants' conduct alleged herein has affected Plaintiff at its offices and its construction projects located within the judicial district of this Court.

3. Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, which does business in, among other places, Los Angeles, California, County of Los Angeles, and with its principal place of business in Culver City, County of Los Angeles, California. Plaintiff is now, and at all times herein mentioned has been, engaged in business as a fire protection contractor duly licensed under the laws of the State of California.

4. (a) Defendant VICTORIA BRADSHAW ("BRADSHAW") is, and at all times herein mentioned has been, Chief of the Division of Labor Standards Enforcement ("DLSE"), (also known as the Labor Commissioner) Department of Industrial Relations, State of California, and, as such, is the public officer of the State of California responsible for enforcement of the State's "prevailing

wage and apprenticeship" laws (*California Labor Code* §§ 1720-1815).

(b) Defendant BRADSHAW is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

5. (a) Defendant LLOYD W. AUBRY, JR. ("AUBRY") is, and at all times herein mentioned has been, Director of the Department of Industrial Relations, State of California, and as such is the public executive officer of the State of California responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including the "prevailing wage and apprenticeship" laws.

(b) Defendant AUBRY is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of U.S.C. §1983.

6. (a) Defendant DANIEL DELLAROCCA ("DELLAROCCA") is, and at all times herein mentioned has been, a Deputy Labor Commissioner of the Division of Labor Standards Enforcement (hereinafter "DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant DELLAROCCA is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

7. (a) Defendant ROGER MILLER ("MILLER") is, and at all times herein mentioned has been, a regional

manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant MILLER is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

8. (a) Defendant ROSA FRAZIER ("FRAZIER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant FRAZIER. is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

9. Defendants MILLER, FRAZIER, BRADSHAW and AUBRY, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

10. Defendant DIVISION OF LABOR STANDARDS ENFORCEMENT ("DLSE"), is, and at all times herein mentioned has been, an agency of the State of California.

11. Defendant DEPARTMENT OF INDUSTRIAL RELATIONS ("DIR") is, and at all times herein mentioned as [sic] been, an agency of the State of California.

12. Defendants DLSE and DIR, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

13. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names.

14. Plaintiff has performed work both as a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements set forth in the California Labor Code.

15. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor.

16. Defendants, acting under color of California Labor Code §§ 1727-1731, 1774, 1775, 1777.5 and 1815, issued Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the prime contracts on public works projects on account of the alleged failure of Plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws. Defendants also issued a Notice of Penalty Assessment purportedly pursuant to

Cal. Labor Code §1776. The Notice of Penalty Assessment was issued without prior notice.

17. Prior to issuing the Notices mentioned in Paragraph 16, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due.

18. The amount presently withheld as a result of such notices is more than $135,000.

19. The awarding bodies continue to withhold not less than $135,000 from the Prime Contractors who employed Plaintiff, on account of the Notices.

20. None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation or post-deprivation hearing on the claims involved.

21. California Labor Code §1729 provides:

> "1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The Prime Contractors for the Projects have withheld from Plaintiff not less than $135,000 due to the withholding from said Prime Contractors of monies due to the Notices.

22. Defendants stated to Plaintiff that there is no right to a pre-deprivation hearing. Defendants stated to Plaintiff that Labor Code §1732 provides that a lawsuit by the contractor or his assignee pursuant to Labor Code §1731 et seq. is the exclusive remedy of the contractor or his assignee with regard to wages and/or penalties withheld. Plaintiff has been deprived of the sum of not less than $135,000 in earned progress payments due it under its contracts for the Projects.

23. There was no hearing held prior to the issuance of any of the Notices. There is no procedure for a prompt post-withholding hearing with regard to such notices to withhold. There is no requirement that Defendants ever carry any burden to justify the issuance of a notice to withhold. There is no procedure to protect against the issuance of notices to withhold in an excessive amount, resulting in withholding of excessive amounts of money.

24. The issuances of the notices to withhold by DLSE are not necessary to the implementation or enforcement of the prevailing wage laws. There are no emergency circumstances which necessitatc the issuance of notices to withhold without a hearing and/or other reasonable and appropriate procedures.

25. The notices to withhold issued by the DLSE on account of alleged violations by Plaintiff at the above mentioned projects are wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably.

26. The issuance of the notices to withhold caused Plaintiff to be deprived of property in the form of substantial sums of money as the statutory provisions purported to be enforced by DLSE provide that upon the

withholding of money from a prime contract by an awarding body, the contractor may withhold said money from the subcontractor. Thus, the notices to withhold issued by the DLSE were intended to, and did, cause Plaintiff to suffer a deprivation of property.

27. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment.to the U.S. Constitution. Plaintiff is informed and believes and thereupon alleges that Defendants so deprived Plaintiff with knowledge that their actions were in violation of the U.S. Constitution. A reasonable person with knowledge of the facts and information known and available to Defendants would know that the actions as hereinabove alleged were unconstitional.

28. There is now existing between Plaintiff on the one hand, and Defendants, and each of them, on the other hand, an actual, justiciable controversy with respect to which Plaintiff is entitled to have a declaration of its rights and equitable relief, because of the facts, conditions, and circumstances set forth above.

29. (a) Plaintiff is entitled to a declaration of its rights declaring the acts of Defendants, and each of them, have been and are invalid, illegal, and in deprivation of Plaintiff's due process and property rights guaranteed by the Section 1 of the Fourteenth Amendment to the Constitution of the United Sates, [sic] that the Notices are invalid and of no legal effect.

(b) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the

California Labor Code set forth herein are unconstitutional on their face and as applied, and to prosecute this action, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. §1988.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

(Facial Unconstitutionality of State Laws)

30. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 29 of the First Claim for Relief as though fully set forth herein.

31. (a) Insofar as is relevant herein, *California Labor Code* §§1727, 1730, 1732, 1733, 1775, and 1776(g), provide:

§1727. Withholding of Forfeited Sums

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body. (1937 ch. 90, 1431, 1992 ch. 1342)"

§1730. Transfer of Wages and Penalties to Labor Commissioner

"Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job. (1992 ch. 1342)"

§1733. Recovery of Wages and Penalties – Suit

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractors or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(1937 ch. 90, 1957 ch. 398, 1988 ch. 160, 1992 ch. 1342)"

§1775. Payment Less Than Stipulated Rate – Penalty

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part."

§1776. Payroll records: retention: inspection; noncompliance penalties; rules and regulations

"(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that

the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due."

(b) On their face, Sections 1727, 1729, 1730, 1732, 1733, 1775 and 1776, deny and deprive persons of their property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said Sections authorize the deprivation of property without notice or hearing, and provide for the imposition of penalties and forfeitures without notice or hearing.

(c) Defendants presently maintain a policy and practice pursuant to *California Labor Code* §§1720-1815 which authorizes the withholding of monies from Contractors and Subcontractors who perform services on Public Works Projects, as well as the imposition of penalties and forfeitures, without providing such Contractors and Subcontractors any prior notice or prior hearing for alleged violations of said Sections.

(d) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorneys fees pursuant to the provisions of 42 U.S.C. §1988.

THIRD CLAIM FOR RELIEF

(Injunction)

32. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 31 above as though fully set forth herein.

33. The actions and conduct of Defendants have caused Plaintiff to suffer great and irreparable injury and unless the Court issues relief by way of a Temporary Restraining Order, Preliminary and Permanent Injunction, Plaintiff and other contractors will suffer great and irreparable injury in that Plaintiff and other contractors will (1) be deprived of its property without due process of law; (2) be liable for civil penalties and back wage forfeitures; (3) be required to expend time and money; and (4) be exposed to unfavorable publicity which will injure its reputation as a reputable construction firm resulting in loss of business.

34. Plaintiff does not have an adequate remedy at law because (1) the pecuniary damages which it might suffer are presently difficult or impossible to fully ascertain; and (2) the irreparable injury to Plaintiff's reputation cannot be fully compensated by money damages. Further, since the provisions of the California Labor Code set forth herein are unconstitutional on their face, as well as in application to Plaintiff, Defendants' conduct in continuing to maintain and enforce such unconstitutional provisions entitles Plaintiff to injunctive relief to enjoin such provisions.

35. Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorneys' fees pursuant to the provisions of 42 U.S.C. §1988.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1. **ON ITS FIRST CLAIM FOR RELIEF**:

   a. For a Declaration Of Rights in Plaintiff's favor that as applied to Plaintiff, *California Labor Code* §§1720-1815 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Notices are-invalid and of no legal effect;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

2. **ON ITS SECOND CLAIM.FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that on their face, *California Labor Code* §§1727, 1729, 1730, 1732, 1733, 1775 and 1776 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

3. **ON ITS THIRD CLAIM FOR RELIEF**:

   a. For a Temporary Restraining Order, Preliminary and Permanent Injunction enjoining Defendants, and each of them, and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with them, including representatives of the awarding bodies from enforcing, or threatening to enforce, the provisions of *California Labor Code* §§1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any "public works" project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury..

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

(Certificate Of Service Omitted In Printing)

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
By: THOMAS S. KERRIGAN, Bar No. 36003
MICHAEL VILLENEUVE, Bar No. 80785
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Los Angeles, CA 90012
(213) 897-1551

Attorney for the Labor Commissioner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL	CASE NO. 95-4839 R (BQRx) NOTICE OF MOTION AND MOTION TO DISMISS [F.R.C.P. Rule 12(b)] DATE: November 6, 1995 TIME: 10 a.m. Courtroom No. 8, (Filed ___)

RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

TO THE ABOVE-NAMED PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 6, 1995 at 10 a.m., or as soon thereafter as the matter can be heard, in Courtroom No. 8 of the Honorable Manuel Real, District Court Judge, located at 312 N. Spring Street, Los Angeles, California, defendants will move the Court for an order dismissing this case pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

The motion will be made on the grounds that the Complaint fails to state a claim upon which any relief can be granted and that Plaintiff has no standing to assert the challenges contained in its complaint.

The motion will be based on this Notice of Motion, the accompanying memorandum of points and authorities, and the pleadings, files and records in this action.

DATED: September 19, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
By: /s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for State Defendants

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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(213) 897-1511

Attorney for the Labor Commissioner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,

Plaintiff,

vs.

VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official

CASE NO. 95-4839 R (BQRx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

DATE: November 6, 1995
TIME: 10 a.m.
COURTROOM: No. 8

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

TABLE OF CONTENTS

	Page
I. Introduction	2
A. Factual Background	2
B. Prior Proceedings	4
II. ARGUMENT	4
A. The Right Of The State To Prescribe The Conditions Upon Which It Will Permit Its Public Works To Be Performed May Not Be Questioned	4
B. Plaintiff's Injuries, Consisting Solely of Indirect Adverse Effects oF Governmental Action, Are Not Actionable	5
C. The Due Process Clause Does Not Guarantee Plaintiff A Pre-Deprivation Hearing In This Case	9

D. The California Public Works Statutory Scheme Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity Of Contract With Subcontractors, And, Thus, State Law Does Not Recognize A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor	11
E. The California Public Works Law Requires That Any Action To Recover Sums Held By An Awarding Agency Must Be Brought By The Contractor Or His Assignee	12
F. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts	14
G. Plaintiffs Lack Standing To Bring This Action On Behalf Of The Prime Contractors Who Are In Privity Of Contract With The Awarding Bodies	17
H. Even If The Plaintiff Did Have Standing On Behalf Of The Prime Contractors To Question The Actions Of The State In Ordering The Withholding Of Unpaid Wages, The Attack On Constitutional Grounds Must Fail	19
I. The Individual Defendants Are Immune From Suite In This Action	20
J. This Is Not An Appropriate Case For Injunctive Relief Because Plaintiff Has An Adequate Remedy At Law	26
III. CONCLUSION	27

TABLE OF CASES AND AUTHORITIES

Page

Anderson v. Creighton, 483 U.S. 635, 639-640, 107 S. Ct. 3034 (1987) 21, 23, 24

Atkin v. Kansas, 191 U.S 207 (1903) 5

Associated General Contracting Co. v. Coalition For Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991) 27

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) 9

Carribean Marine Service Co. v. Baldridge, 844 F.2d 688 (9th Cir. 988) 27

Cal-Pacific Materials Co. v. Redondo Beach City School District, (1979) 94 Cal.App. 3d 652, 655. .11, 12

Castaneda v. Department of Agriculture, 807 F. 2d 1478, 1480 (9th Cir. 1987) 7

Erickson v. U.S., 976 F. 2d 1299, 1301 (9th Cir. 1992) 21, 22, 24

Fahey v. Mallonee, 332 U.S. 245, 255 (1947) 20

Figueroa v. U.S., 7 F.3d 1405, 1409 (9th Cir. 1993) 21

Foster v. Superior Court, 26 Cal.App.2d 230, 234. 20

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) 15

Grove City College v. Bell, 687 F 2d, 684, 703 (3rd Cir. 1982) 8

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 277 (1982) 4, 21

LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir.1985) 17, 18

Legal Tender Cases, 12 Wall. 457, 551 6

Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990) 14

Lusardi Construction Co. v. Aubry, (1992) 1 Cal.4th 976, 986 16

Madonna v. State of California, (1957) 151 Cal.App.2d 836 ..... 5, 20

Malley v. Brigs, 475 U.S. 335, 341 (1968) 25

Mathews v. Elridge, 424 U.S. 319, 333 (1976). 9, 10

Metropolitan Water District v. Whisett, (1932) 215 Cal. 400 5

Morrissey v. Brewer, 408 U.S. 471, 481 (1972) 9

Nuclear Transport & Storage, Inc. v. United States, 890 F. 2d 1348, 1354 (6th Cir. 1989) 8

O. G. Sansone v. Department of Transportation, (1976) 55 Cal.App.3d 434, 455 ..... 3, 16

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 778-789, 100 S. Ct. 2467 (1980) 6, 7, 8

Powers v. Ohio, 499 U.S. 400, 413 (1991) 18, 19

Purdy & Fitzpatrick v. State of California, (1969) 71 Cal.2d 566, 586 13

Russell v. Landrieu, 621 F.2d 1037, 1040 (9th Cir. 1980) 14

Singleton v. Wulff, 428 U.S. 106 (1976) 18, 19

Stanley v. University of Southern California, 13 F.3d 1313, 1320 (9th Cir. 1994) 26

Tracy v. McIntyre, 29 Cal.App.2d 145 20

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472 ..... 17, 18

Wood v. Ostrander, 879 F.2d 583, 591 (9th Cir. 1989) 21

TABLE OF STATUTES

	Page
California Labor Code §§ 1720-1815	2
California Labor Code § 1727	16, 26
California Labor Code §§ 1727-1731	24
California Labor Code § 1729	16, 26
California Labor Code § 1730	16
California Labor Code §§ 1730-1733	13
California Labor Code § 1732	13, 16
California Labor Code §§ 1731-1733	13
California Labor Code § 1733	12, 16
California Labor Code § 1771	3
California Labor Code § 1773	11
California Labor Code § 1773.2	3
California Labor Code §§ 1773.4	3
California Labor Code § 1774	24
California Labor Code § 1775	3, 12, 13, 16, 17, 24, 26
California Labor Code § 1777.5	24
California Labor Code § 1776	26
California Labor Code § 1815	24
42 U.S.C. §1983	4

I. INTRODUCTION

A. Factual Background

Plaintiff G&G Fire Sprinklers, Inc. (hereinafter "G&G"), performed work as a subcontractor on certain State of California public work projects. The Division of Labor Standards Enforcement, the California agency mandated to enforce the prevailing wage requirements of the California Public Works law (California Labor Code §§ 1720-1815) conducted an investigation concerning the payment of prevailing wages on the above projects and issued "Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the *prime contracts* of the Projects on account of the alleged failure of plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws." As a result of the Notices directed to the awarding bodies, those awarding bodies withheld "not less than $135,000" from payments to the Prime Contractor (Complaint, paragraph 21) Because of the above action, the "*Prime Contractors* for the Projects have withheld from Plaintiff not less than $135,000 due to the withholding from said *Prime Contractors* of monies due to the Notices." (Complaint, Paragraph 21). (Emphasis added).

Plaintiff alleges that "None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation or post-deprivation hearing on the claims involved." (Complaint, Paragraph 20).

To summarize, G&G has contracted with prime contractors to perform work on public work projects in the State of California. Because of the failure of G&G to pay the prevailing wage to the workmen it employed as required by Labor Code §§ 1771 and 1775, the public agency which awarded the public work contract withheld from the prime contractors with which the awarding body was contracting the difference between the wages paid and the prevailing wages due from the sums due under the contract with the awarding body. G&G, as a subcontractor of the prime contractor, is not in privity of contract with the awarding body. Thus, the sum withheld by the awarding body was not owed to G&G, but was withheld from sums which might have been due under the contract to the prime contractors.

The California prevailing wage law provides for notice with respect to the determination of the rate of prevailing wages to be paid on public works projects in the state. (Labor Code § 1773.2) The statutory scheme further provides a procedure for contesting the Director's determination of the prevailing rate of wages. (Labor Code § 1773.4) Thereafter, the prime contractor submits a bid based on the Director's determination with respect to prevailing wages to be paid, and the contract, subsequently awarded for said public work contains notice of the forfeiture to be made by the contractor if either he or his subcontractor fails to comply with the contractural provisions relating to the payment of prevailing wages. (Labor Code § 1775) Thus, the contractor cannot claim that he lacked notice of, or an opportunity to contest, the prevailing wage provision as determined by the Director.

O. G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434, 455.

B. Prior Proceedings

Plaintiff filed the original complaint in this action on July 21, 1995, alleging a claim for Declaratory and Injunctive Relief under 42 U.S.C. § 1983. The only defendants designated therein were the California Labor Commissioner and members of her staff. No agency was named as a defendant. Defendants filed a Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, raising, among other defenses, the doctrine of the qualified immunity of these employees based on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny.

In a patent attempt to cure this defect, plaintiff recently filed its First Amended Complaint. This pleading alleges for the first time in new Paragraph 27 the purported knowledge of these individual defendants that "their actions were in violation of the U.S. Constitution" (First Amended Complaint, p. 8). Furthermore, plaintiff has now named the Division of Labor Standards Enforcement and the Department of Industrial Relations as additional defendants.

As will be seen more fully hereinafter, plaintiff's belated attempts to circumvent the qualified immunity doctrine have been unavailing since under no theory of the facts of this case can these individual defendants have any liability to plaintiff.

II. ARGUMENT

A. The Right Of The State To Prescribe The Conditions Upon Which It Will Permit Its Public Works To Be Performed May Not Be Questioned

The question of the right of the state to dictate the terms upon which it chooses to do business was addressed many years ago and is settled law at this point. The United States Supreme Court in the case of *Atkin v. Kansas* 191 U.S. 207 (1903) concluded:

> "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that regard. Regulations on this subject suggest only considerations of public policy. *And with such considerations the courts have no concern.*" *Id.*, 191 U.S. at 222-223.

In 1932 the California Supreme Court had occasion to pass upon the constitutionality of the prevailing wage law in California and, relying heavily on the *Atkin* case, found that the law passed muster. *Metropolitan Water Dist. v. Whisett* (1932) 215 Cal. 400. Again, in 1957, the California Appellate courts revisited the question in the case of *Madonna v. State of California* (1957) 151 Cal.App.2d 836, and, again, found the statutory scheme met the Fourteenth Amendment Due Process requirements.

B. Plaintiff is Injuries, Consisting Solely Of Indirect Adverse Effects of Governmental Action, Are Not Actionable

As pointed out hereinabove, the allegations of the Complaint in this case specify no direct action by Defendants against Plaintiff. On the contrary, it is indisputable from these allegations that the only action taken by Defendants, the issuance of the various notices (See Complaint, Paragraph 16), was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies from plaintiff for work performed under their subcontracts. By filing this action plaintiff is, in effect, trying to interject itself in a dispute between the prime contractors and the State of California. Defendants accordingly contend that these allegations, standing alone, are insufficient as a matter of law to state a claim for deprivation of due process.

More importantly, the Supreme Court has long held that facts such as those disclosed in the Complaint in this case cannot constitute a basis for relief under the due process clause.

"Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the *indirect adverse effects* of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S.Ct. 2467 (1980) (Emphasis added).

In *O'Bannon* a group of patients sued to prevent a state from cutting off reimbursement of medical expenses to a medical facility where the patients lived without affording members of the group a hearing. The revocation, if upheld, would have required these patients to move to another facility in order to continue to be eligible for medical benefits. While they were all clearly injured by the impending revocation, the Supreme Court held that the detriment the patients experienced was only *indirect* because the action of the state was against the facility and not directly against them. Since they were only indirectly impacted, they could not claim a deprivation of due process because they were denied a hearing. As the Supreme Court took pains to point out, these patients' rights, if any, were against the hospital and not against the public entity.

This fundamental principle of constitutional law, that indirect deprivations of property rights are nonactionable, has been given wide ranging application in a variety of factual situations.

In *Castaneda v. U.S. Department of Agriculture*, 807 F 2d 1478, 1480 (9th Cir. 1987), a store manager sued the Department of Agriculture because that agency had closed the store where he worked as a result of food stamp violations, causing him to lose his job. He claimed he had the right to a hearing prior to such action being taken. Relying on *O'Bannon*, the Ninth Circuit held that Castaneda had no due process claim because he was only

indirectly adversely affected by the action of the Department of Agriculture.

In *Grove City College v. Bell*, 687 F. 2d 684, 704 (3rd Cir. 1982), a college refused to execute certain federal forms required under statutes administered by the United States Department of Education, causing that agency to revoke all student loans and aid at the college without affording a hearing to the affected students. Citing *O'Bannon*, the court held that the students had no claim for violation of due process because they were only indirectly affected by the Department of Education's action.

In *Nuclear Transport & Storage, Inc. v. United States*, 890 F. 2d 1348, 1354 (6th Cir. 1989), a radioactive waste storage company was impacted when the U.S. Department of Energy began offering free storage facilties [sic] to its customers without granting a hearing prior to taking this action. The court held the company was only indirectly impacted under the reasoning of *O'Bannon* and could therefore state no claim for violation of its due process rights.

There can be no logical distinction drawn between the position of the aggrieved parties in these cases and the position of plaintiff here. The State of California acted to enforce its contractual and statutory rights solely with respect to the prime contractors. While plaintiff has undoubtedly suffered some initial detriment as a result of these prime contractors' withholding of funds, its rights, if any, are against the prime contractor and not these defendants. Any adverse impact which plaintiff has suffered is clearly indirect within the meaning of *O'Bannon*

and its progeny and cannot give rise to a claim of deprivation of due process under the reasoning of those cases.

Based on the facts of this case, as alleged in the complaint, it is apparent that plaintiff is, at best, only indirectly impacted by the action of defendants. It accordingly cannot state a claim upon which any relief can be granted and this action should accordingly be dismissed.

C. The Due Process Clause Does Not Guarantee Plaintiff A Pre-deprivation Hearing In This Case

The gravamen of the principle allegations of the Complaint is that plaintiff was denied a pre-deprivation hearing by defendants in violation of their due process rights (Complaint, 17). This contention presumes that plaintiff necessarily possessed a constitutional right to a pre-deprivation hearing, a presumption that is unwarranted in light of present day law.

The extent to which the due process clause mandates a hearing prior to the deprivation of property rights was carefully considered by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 319, 333 (1976). That Court made clear that the question of whether a pre-deprivation hearing must be afforded consistent with principles of due process was not a black and white matter. Reviewing the cases on this subject, the Court stated:

"These decisions underscore the truism that 'due process, unlike some legal rules, is not a technical conception withh [sic] a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected.

The Court in *Mathews* pointed out that there were three factors which must be balanced to determine the need, if any, for a predeprivation hearing: 1. the private interest to be affected: 2. the risk of an erroneous deprivation of interest through the procedures used and the probable value of additional procedural safeguards; and 3. the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 424 U.S. at pp. 332-335.

Taking these factors in order, we note that the first factor, the private interest to be affected, is unquestionably an interest, as pointed out hereinabove, that is only indirectly impacted by the State of California, inasmuch as the Defendants' action was directed only to the prime contractors and not to plaintiff. Despite some superfluous references in the Complaint to the rights of the prime contractors, plaintiff cannot stand in the shoes of these entities, entities that are not even before this court.

The interest of the State of California in preserving prevailing wage rates in public works contracts is treated more fully elsewhere in this memoramdum. [sic] Suffice it to say at this point that Defendants' purposes in this area, including both the preservation of workers' economic

rights and the prevention of unfair competition among competing contractors, is of compelling importance.

Under existing procedures, a prime contractor is empowered to bring suit against the contracting agency under California Labor Code Section 1773 for all wages and penalties alleged to have been improperly withheld. In view of the efficient processing of cases in the courts in Southern California through the ubiquitous fast track procedures, this constitutes a timely and appropriate means of review of State action in these cases. Such a remedy is consistent with enlightened concepts of due process.

Under the circumstances reflected in the allegations of the complaint, it is apparent that the procedures afforded by Defendants for postdeprivation review by the courts of the validity of the withholding of wages and penalties is not violative of due process.

D. The California Public Works Statutory Scheme, Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity of Contract With Subcontractors, and, Thus, State Law Does Not Recognize A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor

The California courts have consistently held that the right of a subcontractor to recover sums it alleges are due for work performed on a public works project is limited to the rights it has under the stop notice provisions of the California Civil Code. *Cal-Pacific Materials Co. v. Redondo*

Beach City School District (1979) 94 Cal.App.3d 652, 655. The *Cal-Pacific* court described the doctrine of privity of contract and explained the remedies available to a subcontractor or materialman:

> "School District contracted with Willens [the prime contractor] and not with Cal-Pacific. Cal-Pacific sold its materials to Western States, Willen's subcontractor, and not to School District. Lack of privity thus precludes recovery by Cal-Pacific unless recovery is permitted because of the stop notice." *Cal-Pacific Materials, supra*, at 656.

In dealing with the prevailing wage statutes, privity of contract is required in order to recover sums "forfeited" by the prime contractor as a result of the failure of that contractor "or by any subcontractor under him or her" to pay the prevailing wage. As described below, the statutory scheme provides only that the prime contractor (or his assignee) has the right to recover the sums withheld *under the contract*.

E. The California Public Works Law Requires That Any Action To Recover Sums Held By An Awarding Agency Must Be Brought By The Contractor Or His Assignee

California Labor Code § 1775 provides that the awarding body must insert in every public works contract a provision which requires the payment of prevailing wages and allows the withholding of wages and penalties in the event of a breach of that provision.

California Labor Code § 1733 provides, *inter alia*:

> "Suit may be brought *by the contractor or his or her assignee* without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract . . . "
> (Emphasis added)

California Labor Code § 1732 provides that the time to bring an action "on the contract" to recover the penalties and wages shall be limited to 90 days and is *the exclusive remedy* of the *contractor or his assignee*. The California Supreme Court has stated that "Labor Code section 1732 provides that a contractor's 'exclusive remedy' for the recovery of penalties assessed under section 1850 shall consist of an action against the awarding body *of his contract* to perform public work under section 1731-1733." *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 586. (Emphasis added)

Again, the requirement under California law is that the prime contractor is contractually responsible for the payment of the prevailing wage (Labor Code § 1775). Failure of either the prime or his subcontractors to pay the prevailing wage is a breach of the prime contractor's contract with the awarding body. Thus, California law, not surprisingly, requires there must exist privity of contract (or an assignment of the contract right) in order to have standing to recover sums withheld from the contract price for breach of the contract occasioned by the failure of either the contractor or subcontractors under him to pay the prevailing wage. (Labor Code §§ 1730-1733) This

requirement is certainly not unique. Common law contract concepts have always required privity in order to bring an action to enforce a contract.

Even the complaint filed by G&G in this action admits that the sums withheld by the awarding body were withheld from the prime contractor, not G&G. The funds were withheld from amounts which *may* have been due the prime contractors under the *contract*. Had insufficient sums been withheld from the prime contractor, the state agency mandated to enforce the prevailing wage law would have been required to bring an action against the prime contractor (not the subcontractor) to recover the wages.

G&G was not a party to the contract between the awarding body and the prime contractors and has no right to recover sums which might be due under that contract just as there is no provision in the prevailing wage law which would allow the state to recover the wages from the subcontractor. Thus, there was no "taking" from the plaintiff and the actions by the state are not within the "zone of interest" protected by the Fourteenth Amendment. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, (1990.)

In sum, there is no right of G&G to "entitlement . . . defined by existing rules or understandings that stem from . . . state law." *Russell v. Landrieu*, 621 F.2d 1037, 1040 (9th Cir. 1980). Thus, G&G enjoys no "property interest" in the sums withheld.

F. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts

The constitutional provision defining the judicial power of the United States extends the power to cases arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.

> "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society. The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In this case, where the gravamen of G&G's action is an effort to have the provisions of the Labor Code dealing with the withholding of sums from the general or prime contractor declared unconstitutional as applied to plaintiff, there must be a deprivation of some right which inures to a contractor in G&G's position as a result of the actions by the state agency. But, as pointed out above,

G&G has no right to the money withheld by the awarding body and, consequently, can suffer no "injury" attributable to the state or its agencies.

Again, in sum, what G&G's allegations fail to establish is that it has any standing to recover the monies withheld by the awarding body pursuant to the contract between the awarding body and the prime contractor – a contract which does not benefit or relate to G&G. Specifically, G&G asks that this court declare Code §§ 1727, 1729, 1730, 1732, 1733 and 1775 unconstitutional. But pertinent Labor Code sections cited above have no affect on subcontractors performing public works in California. The cited sections constitute the statutory scheme in California designed to enforce the prevailing wage law through withholding from sums due to *prime contractors under the contract* when they are contracting with awarding bodies. Pursuant to § 1727, for instance, "Deficiencies and penalties are to be withheld by the awarding body from sums due *under the contract.*" *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986. (Emphasis added) Labor Code §§ 1730 provides that the awarding body is to transfer all wages and penalties that have been withheld pursuant to § 1727 (i.e., under the contract) to the Labor Commissioner. Labor Code § 1732 provides the time frame within which the prime contractor (or his assignee) must bring and [sic] action to recover the sums withheld. The action is to be "on the contract for alleged breach thereof in not making the payment" and this suit is "the exclusive remedy" of the contractor or his assignee. Section 1733 provides that the burden of proof is upon the "contractor or his or her assignee to establish his or her right to the wages and penalties withheld."

Under the clear language of the California Prevailing Wage law it is the contractor who bears liability for wage underpayments made by subcontractors. (Labor Code § 1775) This interpretation comports with case law. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, the prime contractor subcontracted a portion of a public works project to a subcontractor, who then subcontracted a portion of his work. Neither subcontractor paid the prevailing wage to its workers. The state withheld payment to the general contractor to cover the underpayment and the Court of Appeal concluded that this was proper:

> "Plaintiffs entered into a contractural [sic] agreement to the effect that they would comply with . . . section 1775 and that they would forfeit to the state $25 per day for each workman paid less than the prevailing wage by either plaintiffs or by their subcontractors, as well as pay to each workman the difference between the prevailing wage and the amount the workman had received. Thus, when [the] subcontractors . . . failed to pay prevailing wages to their workmen, plaintiffs became contractually liable to pay the penalty to the state as well as to pay the wronged workmen the difference in wages." *Id.*, at 462-463.

G. Plaintiff Lacks Standing To Bring This Action On Behalf Of The Prime Contractors Who Are In Privity of Contract With The Awarding Bodies

One of the elements of standing under Article III is that "the plaintiff must establish that the injury can be

fairly traced to the Defendant's challenged conduct and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United For Separation of Church and State Inc.*, 454 U.S. 464, 472; *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.1985).

In addition to the constitutional requirements of Article III there exist "prudential limitations" which must be met. Here, G&G must assert its own rights and can neither assert nor rely upon the interests of others. *Valley Forge Christian College, supra*, 454 U.S. at 472. In this case, the facts alleged by G&G indicate that the alleged "injury" to itself is "not redressable by a favorable decision," *Valley Forge Christian College, supra*, at 472: *LaDuke, supra*, 762 F.2d at 1323, for even in the unlikely event that this court were to find that the withholding from the prime contractor under the terms of its contract with the awarding body was violative of the Due Process Clause, there is no showing by G&G that the prime contractor would have paid the money over to G&G.

In addition, as the Supreme Court's discussion of third party rights in *Singleton v. Wulff*, 428 U.S. 106 (1976) reveals, G&G must overcome the two-fold prohibition against assertion of third party rights. As the Court noted, such assertion should be the exception and not the rule. *Id.* at 114.

The Supreme Court has more recently addressed the issue of standing to protect the rights of third parties in the case of *Powers v. Ohio*, 499 U.S. 400, (1991). The *Powers* court first restated the long-standing rule: "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief

premised on the legal rights or interests of third parties." *Id.*, at 412. The Court then relied upon *Singleton, supra,* for the proposition that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter," *Powers, supra,* at 413, citing *Singleton, supra.* 428 U.S. at 115. The Court noted that in the case before it "there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons rights." *Powers, supra.* 499 U.S. at 413, and spoke of "this congruence of interests [which] makes it . . . appropriate for the defendant to raise the rights of the [third party]." *Id.*, at 414. The third party "right" which both *Powers* and *Singleton* chose to protect was a constitutionally protected right which the parties held, in common, with all citizens. The right of the juror to serve and the right of the defendant to have that juror serve were not in any way inconsistent.

Here, on the other hand, G&G seeks to represent the interests of prime contractors who have withheld "not less than $135,000.00" from G&G and who, incidentally, have failed to provide G&G with an assignment necessary to recover any of this amount. The fact that these prime contractors did not make such an assignment is instructive inasmuch as there appears to be a lack of a "congruence of interests" between G&G and the prime contractors such that G&G might no [sic] be a "motivated, effective advocate" of the rights of the prime contractors.

H. Even If The Plaintiff Had Standing On Behalf Of The Prime Contractors To Question The Actions of The State In Ordering The Withholding Of Unpaid Wages, The Attack On Constitutional Grounds Must Fail

Even if G&G were allowed to attack the constitutionality of the statute in the stead of the prime contractors, G&G would be in no better position than those it would then represent. There is little doubt that the prime contractors who entered into the contracts with the awarding bodies have benefitted from the fact that they did business with the State under the terms of the Act. These contractors would now be estopped to bring an action to test the constitutionality of the statutory scheme which allows the awarding body to withhold sums due under the contract. The admonition of the U.S. Supreme Court in the case of *Fahey v. Mallonee,* 332 U.S. 245, 255 (1947) would be appropriate:

> "It is an elementary rule of constituional [sic] law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'"

See also *Foster v. Superior Court,* 26 Cal.App.2d 230, 234, *Tracy v. McIntyre,* 29 Cal.App.2d 145, and *Madonna v. State of California,* 151 Cal.App.2d 836.

I. The Individual Defendants Are Immune From Suit In This Action

Up until recently plaintiff has forborn from suing agencies of the State of California in this case and has named solely the following public officials: Victoria Bradshaw, as the Labor Commissioner, Lloyd W. Aubry, Jr., as the Director of the Department of Industrial Relations, Daniel Dellarocca, as a Deputy Labor Commissioner, Roger Miller, as a Deputy Labor Commissioner, and Rosa Frazier, as a Deputy Labor Commissioner.

It is well settled that a qualified immunity shields public officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person must have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982): *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S.Ct. 3034 (1987); *Erickson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992). It is apparent from those cases that the determination of whether qualified immunity exists does not take place in a vacuum. "[W]hether an official protected by qualifies immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . . " *Anderson v. Creighton* at 639.

In determining whether a 'clearly established right' existed, the courts must "survey the legal landscape" as it existed at the time of the alleged violation. *Figueroa v. U.S.*, 7 F.3d 1405, 1409 (9th Cir. 1993); *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), certiorari denied 493 U.S. 938.

The sole allegation against these officials in the original complaint was that they issued certain notices to awarding bodies contracting with the prime contractors regarding the failure to pay prevailing wage rates on the projects involved, doing so without affording plaintiff or its prime contractors a hearing (Complaint, 13 and 14).

Following service and analysis of the previous Motion to Dismiss, plaintiff amended its Complaint, as discussed hereinabove, in an attempt to overcome the defense of qualified immunity. Specifically, it has added new Paragraph 27, which provides as follows:

> "27. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the U.S. Constitution. Plaintiff is informed and believes and thereupon alleges that Defendants so deprived Plaintiff with knowledge that their actions were in violation of the U.S. Constitution. A Reasonable person with knowledge of the facts and information known and available to Defendants would know that the actions as hereinabove alleged were unconstitutional."

Can these conclusionary allegations made on information and belief defeat the defense of qualified immunity in the absence of a showing that some "clearly established" right was violated? Clearly they cannot. The discussion in *Erickson v. U.S., supra,* is instructive on this point:

> "We have divided the qualified immunity analysis into three inquiries:

(1) the identification of the specific right allegely [sic] violated: (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters: and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue."

* * *

"As the Supreme Court has explained herein, if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to 'objective legal reasonableness' that is the touchstone of Harlow [v. Fitzgerald]. Plaintiffs would be able to convert the rule of qualified immunity into a rule of mutually unqualified liability simply by alleging violation of extremely abstract rights . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 3038-39, 97 L.Ed. 2523 (1987). Even if Erickson had identified the rights involved with requisite specifity [sic], however, we are aware of no authority that clearly establishes a constitutional right against the kind of official conduct involved in this case." *Erickson v. U.S.* at 1301.

Plaintiff has not cited and cannot cite any case that stands for the proposition that Sections 1727-1731, 1774, 1775, 1777.5 or 1815 are unconstitutional because no court

has so held. Officials who implement and enforce these provisions like the individual defendants named herein, have the right to assume these provisions are valid until some court tells them otherwise.

While it has been held not to be necessary for the conduct in question to be previously declared unconstitutional to be found inimical to "clearly established law," the unlawfulness of the public official must have been apparent in light of preexisting law. *Anderson v. Creighton*, supra, 483 U.S. at 640.

According to the allegations of the Complaint, the individual defendants merely issued certain notices to awarding bodies who had contracted with the prime contractors regarding the failure to pay prevailing wages without giving a hearing to plaintiff (Complaint, Paragraph 16).

To argue that actions such as these are outside the scope of qualified immunity is to lose sight of the fundamental policy underlying this well-established doctrine. "The general rule of qualified immmunity [sic] is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages'. *Davis* 468 U.S. at 195. Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of English and American common law." *Anderson v. Creighton* at p. 646.

In fact the Supreme Court has gone so far as to declare that the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law". *Malley v. Briggs*, 475 U.S. 335, 341, (1968).

How can plaintiff contend that these officers have violated "clearly established statutory or constitutional rights of which a reasonable person must have known", when the sole and express purpose of this lawsuit is to persuade this court to declare, for the first time, that a due process right to a predeprivation hearing exists under the circumstances alleged in the complaint? This is after all, an area of the law where, as the Supreme Court tells us, concepts are "flexible" and vary depending on the particular fact situation confronting the court. *Morrissey v. Brewer, supra*, 408 U.S. at 481.

Even if plaintiff were to prevail in its aforementioned constitutionality argument, a position Defendants vigorously dispute, it is apparent that these individual Defendants were only performing their legislatively assigned duties in enforcing and implementing provisions of the California Labor Code and could have no reason to believe that these provisions were unconstitutional in any respect. Despite its conclusionary allegations to the contrary, the Complaint in this suit is clearly defective in that it fails to show a knowing violation by these individual defendants of a "clearly established statutory or constitutional right," since whatever their state of mind at the time of the events, the so called "right" plaintiff urges was not "clearly established."

J. This Is Not An Appropriate Case for Injunctive Relief Because Plaintiff Has an Adequate Remedy At Law

Plaintiff attempts to allege a basis for injunctive relief, stating in conclusionary terms that it has suffered irreparable injury and has no adequate remedy at law (Complaint, Paragraphs 33-34). But the specific allegations of the Complaint contradict these general statements, showing that what is in dispute here is no more than a sum of money which has been withheld from plaintiff by the prime contractors due to the actions of defendants in posting certain notices (Complaint, Paragraphs 16, 18-19).

It is significant that the prayer requests not simply status quo relief, but a mandatory injunction preventing defendants "from enforcing, or threatening to enforce, the provisions of California Labor Code && [sic] 1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any 'public works' project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person . . . " Plaintiff is asking for nothing less than a mandatory injunction to accomplish a complete shutdown of the statutory scheme with respect to both itself and all other persons.

To obtain injunctive relief in the federal courts, a plaintiff must demonstrate that his remedy at law is inadequate. *Stanley v. University of Southern California*, 13 F. 3d 1313, 1320 (9th Cir. 1994). It must also demonstrate

that "it will be exposed to some significant risk of irreparable injury." *Associated General Contracting Co. v. Coalition for Economic Equity*, 950 F. 2d 1401, 1410 (9th Cir. 1991) certiorari denied 112 S. Ct. 1671; *Caribbean Marine Service Co. v. Baldridge*, 844 F. 2d 688 (9th Cir. 1988).

There is nothing about this case as disclosed in the allegations of the Complaint that separates it from a garden variety action for monetary damages or justifies the disfavored remedy of a mandatory injunction.

III. CONCLUSION

The withholding of wages and penalties under the Prevailing Wage Rate Act of which the plaintiffs complain was solely and totally from sums due the prime contractors, such withholding having been made as a result of a provision in the contract between the awarding body and the prime contractors. Plaintiffs are not in privity of contract and cannot complain of the actions taken under the contract. Further, even if the plaintiffs did have standing to bring this action on behalf of the prime contractors, the withholding was not a violation of due process because plaintiff was only indirectly impacted by this action. Plaintiff has also failed to overcome the presumption of immunity of public officials inasmuch as it has failed to allege that the individual Defendants knowingly violated "clearly established" legal or constitutional rights in withholding funds from the prime contractors. Finally, plaintiff has failed to state a claim for injunctive

relief because it cannot show that it does not have an adequate remedy at law in money damages.

Dated: September 19, 1995

Respectfully submitted,

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,) Case No.
) 95-4839 R (BQRx)
Plaintiff,)
) [Proposed] ORDER
vs.)
)
VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

The motion of defendants to dismiss plaintiff's complaint was regularly heard on the above date and time. Appearing as attorneys were Thomas S. Kerrigan for defendants, and Stephen A. Seideman for plaintiff.

Having considered all papers filed in this action, and the argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff's complaint be dismissed in its entirety.

DATED: _____

_____
MANUEL REAL
U. S. District Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

TABLE OF CONTENTS

PAGE NO.

I. INTRODUCTION..... 1

II. PLAINTIFF'S COMPLAINT DID NOT CONTEST THE STATE'S AUTHORITY TO ESTABLISH PREVAILING WAGE REQUIREMENTS 2

VIII. THIS CASE INVOLVES REGULATORY, NOT PROPRIETARY CONDUCT OF THE STATE .. 2

IIIV. THE NOTICE TO WITHHOLD CAUSES A DEPRIVATION OF A PROPERTY INTEREST ... 3

IIIV. DEFENDANTS' CONTENTION THAT PLAINTIFF'S INJURIES CONSIST SOLELY OF NONACTIONABLE INDIRECT AVERSE EFFECTS OF GOVERNEMTNAL ACTION IS WITHOUT MERIT 5

VI. DEFENDANTS' CONTENTION THAT THE DUE PROCESS CLAUSE DOES NOT GUARANTEE A PRE-DEPRIVATION HEARING IS IMMATERIAL, AND INCORRECT..... 9

VII. THE FACT THAT CALIFORNIA LABOR CODE DOES NOT PROVIDE A SUBCONTRACTOR WITH THE RIGHT TO CONTEST FORFEITURES OR PENALTIES DOES NOT SUPPORT DEFENDANTS' MOTION TO DISMISS 11

VIII. PLAINTIFF HAS STANDING TO BRING THIS ACTION 12

IX. DEFENDANTS' ARGUMENT WITH REGARD TO IMMUNITY IS INCORRECT AND IMMATERIAL 13

X. PLAINTIFF IS NOT ESTOPPED FROM BRINGING THIS ACTION 14

XI. DEFENDANTS' CONTENTION THAT PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW IS WITHOUT MERIT 20

XII. CONCLUSION 22

TABLE OF AUTHORITIES

PAGE NO.

Ames Construction v. Dole, 727 F. Supp. 502 (D.C. Minn. 1989) 4, 19

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 17-18

Associated General Contractors v. Coalition for Economic Equity, 950 F.2d. 1401 (9th Cir. 1991) 12

Atkin v. Kansas, 191 U.S 207 (1903) 2

Bailey v. Secretary of United States Department of Labor, 810 F.Supp. 261 (D. Alaska 1993) 3, 10

Buck v. Kuikendall, 267 U.S 307 (1925) 16

Building Trades v. Associated Builders and Contractors, 507 U.S. ___, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993) 3

Caribbean Marine v. Baldrige, 844 F.2d 668 (9th Cir. 1988) 21

Castaneda v. U. S. Department of Agriculture, 807 F.2d 1478 (9th Cir. 1987) 7

Fahey v. Mallone, 332 U.S 245 (1947) 16-18

Federal Deposit Insurance Corporation v. Mallen, 486 U.S. 230, 242, 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988) 11

Flast v. Cohen, 392 U.S. 83 (1968) 13

Foster v. Superior Court, 26 Cal.App.2d 230, 79 P.2d 144 (1938) 18

Fuentes v. Shevin, 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct. 1983 (1972) 4, 10

Goldberg v. Kelly, 397 U.S 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970) 4

Grove City College v. Bell, 687 F.2d 684 (3d. Cir. 1982) 7

Lusardi Construction v. Aubry, 1 Cal. 4th 976 (1992) 16

Madonna v. State of California, 151 Cal.App.2d 836 (1957) 18

Matthews [sic] *v. Elridge*, [sic] 424 U.S. 319 (1976) .. 9-10

Nuclear Transport v. United States, 890 F.2d 1348 (6th Cir. 1989) 8

O'Bannon v. Town Court Nursing Center, 447 U.S. 773; 100 S.Ct. 2467 (1980) 5-7

Salla v. County of Monroe, 64 A.D.2d 437, 409 N.Y.S.2d 903 (1970) 13, 19

Sniadach v. Family Finance Corp., 395 U.S. 337; 23 L.Ed.2d 349; 89 S.Ct. 1820 (1969) 10

Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994) 21

Thompson v. Consolidated Gas, 300 U.S. 55 (1936) 16

Tracy v. McIntyre, 29 Cal.App.2d 145, 84 P.2d 526 (1938) 18

United States v. James Daniel Good Real Property, 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) 4, 10-11

Warth v. Selvin, 422 U.S. 490 (1975) 13

TABLE OF STATUTES

PAGE NO.

California Labor Code §1729 ..... 3, 6

California Labor Code §1733 18

I. INTRODUCTION

Plaintiff contends that the provisions of the California Labor Code which authorize the California Division of Labor Standards Enforcement ("DLSE") to assess penalties and forfeitures, and order money withheld, on account of alleged violations without notice or hearing is unconstitutional. Plaintiff further alleges that the law is unconstitutional as applied to Plaintiff. The law and procedures in question relate to the prevailing wage requirements in the California Labor Code.

Defendants are DLSE, and officials of DLSE. Plaintiff seeks to enjoin Defendants from enforcing the unconstitutional statutes and/or undertaking unconstitutional enforcement action. Plaintiff also seeks declaratory relief that such statutes, and enforcement actions, are unconstitutional and invalid.

Plaintiff filed this lawsuit previously. At that time, DLSE was withholding more than $230,000 of Plaintiff's money. On the eve of Plaintiff's summary judgment motion, DLSE offered to release all but $30,000 of the funds if Plaintiff would dismiss the lawsuit. Plaintiff agreed to the settlement because it needed the money, and with the express proviso that the dismissal was without prejudice and that the lawsuit could be re-filed if further action was taken against Plaintiff.

Thereafter, DLSE assessed penalties against Plaintiff for purportedly not responding in a timely manner to a request by DLSE for copies of payroll reports. Apparently, the purported written request was sent to a previous address of Plaintiff. DLSE has refused to provide any information with regard to the factual basis for the assessment of penalties, or the method or calculation thereof. DLSE has taken other action in furtherance of its pattern of harassment of Plaintiff. Plaintiff filed this lawsuit to seek declaratory and injunctive relief with regard to the unconstitutional labor laws, and unconstitutional actions of DLSE.

The assertion in the moving papers that Plaintiff violated the prevailing wage laws is disputed as false and meritless. In fact, Plaintiff contends that the assertion of

penalties is not only meritless, but frivolous. Nevertheless, the issue in this case is not whether Plaintiff violated the labor laws, or whether the State has authority to require payment of prevailing wages. The issue in this case is that the enforcement procedures are unconstitutional, as they do not comply with the due process requirements for notice and hearing.

Defendants filed a similar motion to dismiss in the prior case which was denied.

II. PLAINTIFF'S COMPLAINT DID NOT CONTEST THE STATE'S AUTHORITY TO ESTABLISH PREVAILING WAGE REQUIREMENTS

Defendants assert that the State has authority to establish prevailing wage requirements. *See, Atkin v. Kansas*, 191 U.S. 207 (1903). Plaintiff's complaint does not dispute the State's authority to establish prevailing wage requirements. Plaintiff asserts that such requirements must be enforced in accordance with the due process requirements of the Constitution.

III. THIS CASE INVOLVES REGULATORY, NOT PROPRIETARY CONDUCT OF THE STATE

It should be noted that this case involves state officials acting in a regulatory, and not proprietary manner. The question of the application of due process to proprietary conduct of the State is not presented by this case, and need not be addressed by the Court. The courts have explained that there is sometimes a distinction in the restrictions placed on State conduct depending on

whether the State is acting in its regulatory capacity, or in proprietary manner. *See, Building Trades v. Associated Builders and Contractors* 507 U.S. ___, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993). The State acts in a proprietary manner when, as an owner of property, it conducts business as would any private owner of property, with no interest in setting policy. *Id.* at 576, 577. This case involves conduct by Defendants which is wholly regulatory. To wit, the imposition of penalties for alleged violations of the state labor code. The mandates of the due process clause of the United States Constitution are fully applicable.

IV. THE NOTICE TO WITHHOLD CAUSES A DEPRIVATION OF A PROPERTY INTEREST

The issuance of a notice to withhold based on alleged violations by Plaintiff deprives Plaintiff of a property interest under the due process clause. California Labor Code §1729 provides that if an awarding body withholds money from a prime contractor due to alleged violations of a subcontractor, the prime contractor may withhold money from the subcontractor. Therefore, whether Plaintiff acts as a prime contractor, or subcontractor, the issuance of a notice to withhold results in the deprivation of money due for work performed.

In *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) the court held that withholding money from a contractor due to alleged prevailing wage violations was a deprivation of property. The court also so held in *Ames Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989), wherein the court stated: "The court finds that the government's suspension of payments to

Ames does constitute a deprivation of property subject to the due process clause of the Fifth Amendment."

In *Fuentes v. Shevin* 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct. 1983 (1972), the party did not hold legal title to the goods seized, but merely had a possessory interest. The court held that "the interest in continued possession and use of the goods" was a property interest protected by the due process clause. *Fuentes supra* at 86. The court stated that the Fourteenth Amendment "has been read broadly to extend protection to any significant property interest." *Id.* at 86. In *Goldberg v. Kelly* 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970) the court held that the right to receive government welfare payments was a property interest protected by the due process clause. *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) involved the non-final seizure of real property which was rented to tenants. The court stated that the government "contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection." *Daniel supra.* at 501. The court in *Daniel* explained that "individual freedom finds tangible expression in property rights." *Id.* at 505. Certainly, the right to receive contract payments for work performed is a property interest protected by the due process clause.

V. DEFENDANTS' CONTENTION THAT PLAINTIFF'S INJURIES CONSIST SOLELY OF NON-ACTIONABLE INDIRECT AVERSE EFFECTS OF GOVERNMENTAL ACTION IS WITHOUT MERIT

Defendants assert that under *O'Bannon v. Town Court Nursing Center* 447 U.S. 773; 100 S.Ct. 2467 (1980) Plaintiff cannot assert a claim. Defendants' contention is completely without merit. *O'Bannon* does not bar Plaintiff's claim. To the contrary, *O'Bannon* expressly makes clear that Plaintiff may assert a claim. Moreover, the First Amended Complaint alleges that Plaintiff has acted, and intends to act, as a prime contractor, as well as a subcontractor (Compl. ¶¶ 14-15).

O'Bannon concerned a nursing home which had been certified to provide care for patients receiving Medicare/Medicaid. The government revoked the certification pursuant to proceedings instituted against the nursing home (Town Court). There was no dispute that due process was provided to Town Court. Certain patients of the nursing home contended that they had a separate right to a due process hearing before the certification could be revoked. The court rejected the argument of said patients. The court analogized the situation to that if a utility turned off the electrical power to the nursing home. Although due process may require a public utility to give prior notice to the nursing home, such requirement would not extend to each patient in the nursing home. The Supreme Court expressly distinguished a situation where governmental action against a person is intended or expected to affect a third person who is considered the responsible party, such as in the present case. *Id.* at 789, fn. 22.

A notice to withhold asserted because of alleged violations by a subcontractor is precisely the type of situation distinguished by the court in *O'Bannon*. The statutory scheme provides that upon the assertion of forfeitures and penalties on account of a subcontractor, the subcontractor's money is withheld (Cal. Labor Code § 1729). The deprivation of such money as the result of a notice to withhold alleging violations by the subcontractor is not a mere incidental effect of the governmental action. To the contrary, it is the expected and intended effect.

In *O'Bannon*, the court explained that it was significant that the nursing home had a due process right to contest the decertification, and was the party with the greatest interest in doing so. *Id.* at 789 fn. 22; 797. Under California Labor Code, neither the prime contractor or subcontractor is entitled to due process. Moreover, if the subcontractor's money is withheld, the prime contractor would have no financial incentive to contest the action in any event. The concurring opinion further explained that in *O'Bannon* the underlying source of the benefit was removed, as opposed to specific action against specific persons. The court analogized the situation to that if the government eliminated an entitlement program entirely. The court explained that each individual is not entitled to a due process hearing when the underlying source of a benefit is removed, but such a right does arise when action is taken against a specific person. The notice to withhold procedure involves action taken against a specific person. The court further explained that a decertification affected all patients equally, in a non-discriminatory manner. The notice to withhold procedure discriminates

as to the particular person subjected to the forfeitures and penalties. Another fact asserted by the court in support of the decision was that the patients were not alleged to have been responsible for the decertification. However, the issuance of a notice to withhold as to a subcontractor is based on purported violations by the subcontractor.

The holding in *O'Bannon* is clearly not applicable to this case. Moreover, the court in *O'Bannon* expressly distinguished the situation presented here from its holding.

Defendants also cite three Court of Appeal cases which relied on *O'Bannon*. However, those cases are equally inapplicable to the present case.

In *Castaneda v. U. S. Department of Agriculture* 807 F.2d 1478 (9th Cir. 1987) the government revoked the right of a store to accept food stamps. Thereafter, the store manager was fired. The store manager sued contending that he was entitled to a due process hearing with regard to the revocation (there was no dispute that the store received due process).The court held that employees of the store had no due process right, with regard to the revocation, separate and distinct from the store. The court held that the governmental action did not deprive Castaneda of any property interest. The court expressly stated that the result would be different if the governmental action against the store targeted Castaneda in some manner. The decision in Castaneda is inapplicable for the same reason as set forth above with regard to *O'Bannon*.

In *Grove City College v. Bell* 687 F.2d 684 (3d. Cir. 1982) the court held that any college with students receiving federal student aid was required to comply with federal anti-discrimination laws. There was no dispute that the

college received due process. However, individual students at the college receiving student aid contended that they had a separate right to a due process hearing. The court held that there was no deprivation of property as to the students since their entitlement was to student aid at a qualified college. The students remained entitled to such benefits. The issue of whether the college complied with federal antidiscrimination laws was a matter between the college and the government. The students had no separate right to a hearing on the issue of whether the college complied with anti-discrimination laws. The case is inapplicable to the present case. In this case, no person is afforded due process rights with regard to the withholding. Moreover, the person alleged to have committed the violations resulting in penalties and forfeitures is entitled to a due process hearing.

In *Nuclear Transport v. United States* 890 F.2d 1348 (6th Cir. 1989) the government licensed the plaintiff to store hazardous material. The government then offered its own storage facilities in competition with plaintiff. Plaintiff contended that it was deprived of property by way of the reduction in the value of its license. The court held that the license was non-exclusive, and there was no promise or agreement that the government would not offer competing facilities. Therefore, there had been no deprivation of property. The case is completely inapplicable to this action.

Defendants argument that no due process rights accrue to a person subjected to penalties and forfeitures due to purported violations of labor law is without merit. The legal authorities cited by Defendants do not support their position.

VI. DEFENDANTS' CONTENTION THAT THE DUE PROCESS CLAUSE DOES NOT GUARANTEE A PRE-DEPRIVATION HEARING IS IMMATERIAL, AND INCORRECT

Defendants assert that the due process clause does not provide a right to a pre-deprivation hearing. With regard to a motion to dismiss, the argument is both incorrect and immaterial. In the limited circumstances where a pre-deprivation hearing is not required by due process, a prompt post-deprivation hearing is required. The California Labor Law provides for neither a predeprivation hearing, or a prompt post-deprivation hearing. Therefore, the law, and Defendants' actions, are unconstitutional under any circumstances.

Defendants' reliance on *Matthews v. Elridge* 424 U.S. 319 (1976) to support its contention that no pre-deprivation hearing is required is misplaced. *Matthews* did not involve the imposition of penalties for alleged wrongdoing. Moreover, in *Matthews*, the procedure under review involved substantial due process protections. The case concerned termination of disability benefits. The court distinguished determinations based on credibility of witnesses, and factual disputes. The court explained that disability benefits were mostly based on medical records provided by generally objective and verifiable reports of doctors. The court explained that where factual disputes involving issues of credibility are involved, a more formal pre-deprivation hearing is required.

In *Matthews*, there was an informal pre-deprivation hearing which included an explanation of the basis for the proposed termination, and an opportunity to present

contrary evidence. In the present case, there is no procedure for any pre-deprivation hearing whatsoever. In fact, notices to withhold based on penalties and forfeitures are issued without any prior notice or explanation of the basis therefor. Moreover, in *Matthews*, there was an extensive procedure for post-deprivation hearings to contest the determination. California Labor Law provides for no such prompt post-deprivation hearing procedure. *Matthews* does not support the contention that there is no right to a pre-deprivation hearing with regard to assessment of penalties and forfeitures by Defendants.

The right to a pre-deprivation hearing is well established. *See, Fuentes v. Shevin* 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct. 1983 (1972); *Sniadach v. Family Finance Corp.* 395 U.S. 337; 23 L.Ed.2d 349; 89 S.Ct. 1820 (1969). The right to such hearing was recently reaffirmed in *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), wherein the court stated "The right to prior notice and a hearing is central to the Constitution's command of due process." In *Bailey v. Secretary of United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) the court held that pre-deprivation hearing was required before money could be withheld due to alleged prevailing wage violations. A pre-deprivation hearing may be dispensed with only in extraordinary circumstances *Fuentes supra, Sniadach sup:* "To establish exigent circumstances, the government must show that less restrictive measures . . . would not suffice." *James Daniel Good supra* at 505. The requirement of neutral decision making "is of particular importance . . . where the government has direct pecuniary interest in the outcome of the proceeding." *Id.* at 502.

Even where extraordinary circumstances justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided. *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 242, 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988). In *James Daniel Good supra*, the court held a post-seizure right to trial was insufficient to comply with the requirements of due process.

Defendants' contention that there is no right to pre-deprivation hearing is without merit. Moreover, the issue is immaterial, since a prompt, post-deprivation hearing would be required in any event. Since neither is provided for under the Labor Code, the motion to dismiss should be denied.

VII. THE FACT THAT CALIFORNIA LABOR CODE DOES NOT PROVIDE A SUBCONTRACTOR WITH THE RIGHT TO CONTEST FORFEITURES OR PENALTIES DOES NOT SUPPORT DEFENDANTS' MOTION TO DISMISS

Defendants explain that under California law only a prime contractor may seek recovery of money withheld on account of a notice to withhold issued by DLSE. Defendants' assertion merely highlights the unconstitutionality of the procedure. The DLSE may issue a notice to withhold asserting penalties and forfeitures on account of purported labor law violations by a subcontractor. The Labor Code provides that payment is then withheld from both the prime contractor, and subcontractor. Thus, the subcontractor bears the financial burden of the withholding. However, as Defendants explain, the subcontractor has no right, at any time, to contest the penalties or

forfeitures. The denial of due process is blatant, and indisputable.

VIII. PLAINTIFF HAS STANDING TO BRING THIS ACTION

The allegations of the complaint established that Plaintiff has standing to bring the action. Plaintiff has worked both as a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements of the California Labor Code. *See,* Plaintiff's First Amended Complaint (hereinafter "Compl."), paragraph 14. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor (Compl. ¶ 15). Defendants assessed penalties and issued notices to withhold, on an account of alleged violations by Plaintiff (Compl. ¶ 16). As a result, there is presently in excess of $135,000 in money withheld from Plaintiff (Compl. ¶¶ 18-21). The notices to withhold were intended to, and did, cause Plaintiff to be deprived of its money (Compl. ¶ 26).

In *Associated General Contractors v. Coalition for Economic Equity* 950 F.2d. 1401 (9th Cir. 1991) the court reaffirmed the broad scope of standing to contest invalid laws and government action. The court held that an association of contractors had standing to contest the validity of a municipal ordinance providing bid preferences to minority business enterprises. The court held that standing to determine the validity of executive or legislative action exits [sic] where a party has sustained, or is in immediate danger of sustaining, injury from the action.

Plaintiff has alleged injury from the unconstitutional procedure for assessment and withholding of penalties and forfeitures. Moreover, since Plaintiff will continue performing work on public works projects in California, Plaintiff is in immediate danger of further injury. Plaintiff has standing, just as the association of contractors has standing to challenge the ordinance in the above cited case. In *Flast v. Cohen* 392 U.S. 83 (1968) the court held that plaintiff's status as a tax payer was sufficient to confer standing to attack a statute provided for the payment of government money to a religious school. In *Warth v. Selvin* 422 U.S. 490 (1975), the court held plaintiff had standing to attack the constitutionality of exclusionary zoning. The court explained to have standing a party need merely only show some injury due to the governmental action. Moreover, the court stated so long as the plaintiff suffered some injury, the plaintiff may invoke the rights of others. *Warth supra* at 501. The court further explained that a third party has standing where its injury resulted indirectly in the deprivation of the rights of another. *Id.* at 504-505. In *Salla v. County of Monroe* 64 A.D.2d 437, 409 N.Y.S.2d 903 (1970) the court whether non-resident employees had standing to contest a labor code provision which required the use of resident labor on public works projects. The court held that the fact that the employees had no legal relationship with the awarding body for the contracts was irrelevant. The court held that the employees had standing to contest the statute.

Plaintiff has suffered, and continues to suffer on an ongoing basis, substantial injury due to the unconstitutional enforcement of the prevailing wage law. Clearly,

Plaintiff has standing to assert the unconstitutionality of the statutes, and their application.

IX. DEFENDANTS' ARGUMENT WITH REGARD TO IMMUNITY IS INCORRECT AND IMMATERIAL

Defendants argue that the individual Defendants have immunity from this litigation. The law regarding immunity cited by Defendants relates to actions for damages. Defendants do not have immunity from actions seeking declaratory and injunctive relief. All the cases cited by Defendants relate to actions for damages.

Moreover, even as to actions for damages the immunity is qualified. There is no immunity where Defendants should have known that their conduct was unconstitutional. Plaintiff specifically alleged in paragraph 27 of the First Amended Complaint that Defendants knew, and should have known, that their actions were in violation of Section 1 of the Fourteenth Amended [sic] to United States Constitution. Thus, even as to action for damages, Defendants would not be entitled to dismissal at the pleading stage.

Furthermore, the Court may take judicial notice of the prior lawsuit filed by Plaintiff alleging Defendants' unconstitutional action. The lawsuit was dismissed without prejudice pursuant to an agreement which specifically provided that it could be re-filed if Defendants took further action against Plaintiff. The previous lawsuit, and Plaintiff's motion for summary judgment therein, established that Defendants knew, and should have known, that their actions were unconstitutional.

X. PLAINTIFF IS NOT ESTOPPED FROM BRINGING THIS ACTION

Defendants argue that Plaintiff stands in the shoes of the prime contractors. Defendants contend that the prime contractors are estopped to bring such an action because they did business with the State under the terms of the act. Defendants argue that since Plaintiff stands in the shoes of the prime contractor, the estoppel applies to Plaintiff. However, Plaintiff does not stand [sic] the shoes of the prime contractors. Plaintiff has standing in its own right to bring this action. *See*, part II above. Therefore, the argument that the prime contractors would be estopped to bring such an action is immaterial. Plaintiff is not estopped to bring the action by any conduct of the prime contractors. Thus, Defendants' contention regarding estoppel is without merit.

Even assuming arguendo that an estoppel could apply under some circumstances, it would apply only to a facial attack on the validity of the statute. An estoppel could not apply to Plaintiff's claim for unconstitutional application by Defendants. Defendants contend that the prime contractor somehow accepted benefits under the statute, and therefore cannot challenge the constitutionality of the statute. Even assuming arguendo this were correct, no one accepted unconstitutional enforcement procedures by Defendants which are not specified by statute. The issue of an estoppel, at most, could only relate to Plaintiff's attack on the facial validity of the statute providing for imposition of penalties. Plaintiff could proceed with its action for unconstitutional application of the statue [sic] under any circumstance.

Furthermore, the issue of estoppel cannot apply to prospective relief sought by Plaintiff. Plaintiff seeks to have the statutes (and Defendants' conduct) declared unconstitutional for future projects. The argument of estoppel cannot apply to such prospective relief. Plaintiff cannot be estopped by conduct not yet undertaken.

In any event, there is no estoppel established by the pleadings under any circumstances whatsoever. No benefit was received under the prevailing wage statutes. The prevailing wage statutes are merely statutory requirements imposed upon contractors. *See, Lusardi Construction v. Aubry* 1 Cal. 4th 976 (1992). A contractor (or subcontractor) receives no benefit whatsoever from the prevailing wage statutes. Even assuming arguendo there had been some benefit, receiving a benefit under an act does not estop a party from challenging a separable part of the act. *Thompson v. Consolidated Gas* 300 U.S. 55 (1936). In holding that acceptance of benefits under one portion of an action does not estop a party challenge another separable part, the court stated the following with regard to the benefits received, "those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, and which seemed clearly separable from the sections here challenged." *Id.* at 81. *See, also, Buck v. Kuikendall* 267 U.S. 307 (1925).

Assuming arguendo that Plaintiff had received some benefit under the Act, the provision allowing penalties to be imposed by the Labor Commissioner without notice and hearing is clearly separable and subject to challenge.

Defendant cites the case of *Fahey v. Mallone* 332 U.S. 245 (1947). *Fahey* is not applicable. *Fahey* involved an action by a savings and loan association. The association was created pursuant to statute. The association challenged the government's right under the statute to regulate the activities of the association. The court explained that it would be unacceptable to allow an association to function as a chartered savings and loan under the Act, and then challenge the right of the government to regulate its activities as provided for under the Act. The court held that the portions of the Act challenged were not severable from that portion under which the association had obtained benefits.

The portion of the opinion quoted by Defendants failed to include the sentences immediately thereafter that explained the court's decision. The court stated:

> "In the name and right of the association it is now being asked that the Act under which it has its existence be struck down in important particulars, *hardly severable from those provision which grant its right to exist* . . . if it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses with which its management may perpetrate."

Id. at 255-256.

In *Fahey,* the court clearly held that the provisions of the Act being challenged were not severable from the portion granting the association the benefit of its existence. To the extent Plaintiff received any benefits from

the Act as here, the provisions providing for the imposition of penalties without notice of hearing are clearly severable. In this regard, it should be noted that Plaintiff does not contest the ability of Defendants to enforce the prevailing wage law by appropriate means, such as filing a lawsuit or making a claim on a contractor's bond. Also, it should be noted that the court in *Fahey* quotes from *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) with regard to this statement that the court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. In *Ashwander*, the court held that plaintiff was not estopped from attacking the constitutionality of the statute. In *Ashwander*, the court held that the previous acceptance of benefits under the Act was different from the subject of the constitutional challenge. Hence, no estoppel was applicable.

Furthermore, in *Fahey* the plaintiff attacked the right of the agency to impose its regulatory authority. The issue as to which estoppel was applicable went to the substance of the authority to regulate, not the procedural requirements of due process. The plaintiff in *Fahey* also raised an issue of procedural due process with regard to an administrative hearing provided for under the Act. The court did not hold that the plaintiff was estopped to assert the claims. of procedural due process. Plaintiff does not contest the right to impose prevailing wage agreements. Plaintiff merely asserts a right to procedural due process.

The other cases cited by Defendants are also inapplicable. Defendants cite *Foster v. Superior Court* 26 Cal.App.2d 230, 79 P.2d 144, (1938); *Madonna v. State of*

California 151 Cal.App.2d 836 (1957); and *Tracy v. McIntyre* 29 Cal.App.2d 145, 84 P.2d 526 (1938). *Foster* and *Tracy* were cases in which the appellant had brought motions under a statute allowing the court to determine the attorneys fees owed to a previous attorney of record. After a disappointing result, the party who brought the motion challenged the constitutionality of the statute. In *Madonna*, the appellant brought a statutory lawsuit to recover wages and penalties under Labor Code § 1733. The appellant lost the case on the basis that his action was not timely filed. The appellant then challenged the constitutionality of § 1733. In each of the cases the court held that the party was estopped from challenging the statute under which it had brought its action. These cases stand for the proposition that a party may not bring an action under a statute, and then after losing the case, seek to avoid the result by attacking the constitutionality of the statute. The cases are not applicable to this action. Plaintiff does not seek to avoid the results of any previous action.

The issue of estoppel in an action similar to this case was addressed in the case of *Salla v. County of Monroe* 64 A.D.2d 437, 409 N.Y.S.2d 903 (1978). In *Salla*, a contractor brought an action challenging the constitutionality of a statute requiring contractors on public works to utilize resident labor. Defendants argued that the contractor was estopped from challenging the constitutionality of the statute by failing to object until after commencement of construction, and by making substantial efforts to comply with the law. The court stated:

> "We do not deem Lisbon's acceptance of the construction contract to be a waiver of its

> constitutional rights because a public contract should not be conditioned on a waiver of constitutional rights. Nor do we believe that Lisbon's attempts to comply with the statute in order to avoid breaching the construction contract constitute a waiver of the right to challenge its constitutionality."

Id. at 906-907 [Citations omitted].

See, also, Ames Construction v. Dole 727 F. Supp. 502 (D.C. Minn. 1989) wherein the court held that the statutorily mandated inclusion in a contract of provisions relating to withholding for alleged prevailing wage violations does not restrict the contractor's right to challenge the constitutionality of the statutes.

Plaintiff cannot be estopped by any conduct of the prime contractor. Plaintiff cannot be estopped from asserting the unconstitutional application of the law by Defendants. Plaintiff cannot be estopped to seek prospective relief. No estoppel based on any conduct by Plaintiff has been established. Plaintiff did not receive any benefits from, or under, the prevailing wage statutes. Even assuming arguendo Plaintiff had received any benefits, the provisions allowing for the imposition of penalties without a hearing, are severable. Accordingly, Plaintiff's Complaint should not be dismissed.

XI. DEFENDANTS' CONTENTION THAT PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW IS WITHOUT MERIT

Plaintiff has alleged facts establishing that Plaintiff does not have an adequate remedy at law (Compl.

¶¶ 33-34). Plaintiff alleged that Plaintiff has suffered, and will continue to suffer, irreparable injury if Defendants are not enjoined and that Plaintiff will be deprived of its property without due process of law, could be liable for civil penalties and back wage forfeitures without a due process hearing, will be required to expend time and money to vindicate its rights, and will be exposed to unfavorable publicity which will injure Plaintiff's reputation as a reputable construction firm resulting in loss of business (Compl. ¶ 33). Plaintiff further alleged that it does not have an adequate remedy at law because the pecuniary damages which it might suffer are difficult or impossible to fully ascertain, the irreparable injury to Plaintiff's reputation cannot be fully compensated by money damages, and Defendants' conduct is unconstitutional and therefore subject to injunctive relief. The pleadings must be accepted as true with regard to a motion to dismiss. Therefore, the motion to dismiss must be denied.

The cases cited by Defendants support Plaintiff's position. *Stanley v. University of Southern California* 13 F.3d 1313 (9th Cir. 1994) involved an action alleging discrimination in pay based on gender. The court held that the remedy at law is not adequate with regard to a request for an injunction to prevent future discrimination. *Id.* at 1321. Certainly, an injunction is equally appropriate to prevent future violations of constitutional rights of due process.

The case of *Caribbean Marine v. Baldriae* 844 F.2d 668 (9th Cir. 1988) supports Plaintiff's position. In *Caribbean Marine*, the plaintiff sought a preliminary injunction to prevent the government from using female observers on

tuna boats under the Marine Mammal Protection Act. The court held that the plaintiff was not entitled to a preliminary injunction because there was no showing that the plaintiff would suffer any injury whatsoever, as the result of female observers. The court explained that there was no evidence indicating that plaintiff would suffer any economic injury as a result of female (as opposed to male) observers. In this case, Plaintiff would suffer economic injury from continued unconstitutional action by Defendants. Moreover, this motion does not concern a request for a preliminary injunction. Defendants have filed a motion to dismiss Plaintiff's First Amended Complaint. Defendants are not entitled to an order of dismissal.

XII. CONCLUSION

Plaintiff respectfully submits that Defendants' argument in support of the motion to dismiss are completely without merit. Defendants seek to avoid a hearing on the merits because Defendants' position has no merit. Plaintiff respectfully submits that Defendants' motion to dismiss should be denied.

DATED: October 6, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) CIVIL NO. 95-4839 R) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

TO DEFENDANTS AND THEIR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on November 6, 1995, at 10:00 a.m., or as soon thereafter as the matter may be heard by the above-entitled Court, located at Courtroom 8, 312 N. Spring Street, #G-8, Los Angeles, California 90012, Plaintiff G & G FIRE SPRINKLERS, INC. will and hereby does move the Court for summary judgment, or in the alternative, summary adjudication of issues, on the ground that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, for the reasons set forth in the Memorandum of Points and Authorities filed and served concurrently herewith.

This motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Statement of Uncontroverted Facts and Conclusions of Law, Request for Judicial Notice, and Exhibits in Support of Plaintiff's Motion for Summary Judgment filed concurrently herewith, all pleadings and papers on file in

this action, and upon such other matters as may be presented to the Court at the time of the hearing.

DATED: October 16, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	CIVIL NO. 95-4839 R MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

TABLE OF CONTENTS

		PAGE NO.
I.	NATURE OF THE CASE	1
II.	RELIEF SOUGHT	1
III.	THE PARTIES	2
IV.	INTRODUCTION	3
V.	SUMMARY OF ARGUMENT	5
VI.	STATEMENT OF FACTS	6
	A. THE STATUTORY SCHEME	6
	B. THE NOTICE TO WITHHOLD PROCEDURE	8
	C. APPLICATION OF THE NOTICE TO WITHHOLD PROCEDURE TO PLAINTIFF	9
VII.	ARGUMENT	9
	A. THE NOTICE TO WITHHOLD PROCEDURE IS UNCONSTITUTIONAL	10
	1. A hearing is required for a temporary, non-final deprivation of property	10

2. This case involves regulatory, not proprietary conduct of the State... 10

3. The notice to withhold causes a deprivation of a property interest 11

4. A pre-deprivation hearing is required except in extraordinary circumstances..... 13

5. A pre-deprivation hearing is needed for a notice to withhold... 14

6. Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided..... 16

7. A prompt post-deprivation hearing is not available under the notice to withhold procedure 17

VIII. CONCLUSION 21

TABLE OF AUTHORITIES

PAGE NO.

Ames Const. v. Dole 727 F.Supp. 502 (D. Minn. 1989).....12, 16

Bailey v. Secretary of the United States Department of Labor 810 F.Supp. 261 (D. Alaska 1993).....11, 18-19

Barry v. Barachi 443 U.S. 55, 65; 99 S.Ct. 2642, 2649; 61 L.Ed.2d 365 (1979)..... 21

Building Trades v. Associated Builders and Contractors 507 U.S. ___, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993) 11

Chalkboard v. Brandt 902 F.2d 1375 (9th Cir. 1989) 21

Dixon v. Love 431 U.S. 105, 113; 97 S.Ct. 1723, 1727; 52 L.Ed.2d 321 (1979)..... 21

Federal Deposit Insurance Corporation v. Mallen 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988) 13, 16, 18, 20

Fuentes v. Shevin 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct. 1983 (1972) 12, 13

Goldberg v. Kelly 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970)..... 12

Joint Anti-fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172; 71 S.Ct. 624, 647-649 95 L.Ed. 817 (1951) 16

Krueger v. San Francisco 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988).....8, 17

Sinaloa Lake Owners Association v. City of Simi Valley 882 F.2d 1398, 1405 (9th Cir. 1989)..... 13

Sniadach v. Family Finance Corp. 395 U.S. 337; 23 L.Ed.2d 349; 89 S.Ct. 1820 (1969).....10, 13

United States v. James Daniel Good Real Property 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) 10, 12-16, 18, 20

TABLE OF STATUTES

PAGE NO.

California Civil Code § 3181 14

California Civil Code § 3247 14

California Civil Code § 3248 14

California Code of Civil Procedure § 583.310..... 16

California Labor Code § 21 8

California Labor Code § 90.5 7
California Labor Code § 1720 ..... 2, 6
California Labor Code § 1727 ..... 2, 6-7, 21
California Labor Code § 1729 ..... 7, 11
California Labor Code § 1730 ..... 2, 6, 7, 21
California Labor Code § 1731 ..... 2, 6, 7, 17, 21
California Labor Code § 1732 ..... 2, 6, 7, 21
California Labor Code § 1733 ..... 2, 6, 7, 21
California Labor Code § 1771 6
California Labor Code § 1772 7
California Labor Code § 1775 ..... 2, 6-8, 21
California Labor Code § 1776 ..... 2, 4, 6-7, 21
California Labor Code § 1813 ..... 2, 6-7, 21
California Labor Code § 1861 ..... 2, 6

I.

NATURE OF THE CASE

Plaintiff contends that certain provisions of the California Labor Code are unconstitutional under the due process clause of the United States Constitution. Alternatively, Plaintiff contends that the application of the statutes by Defendants is unconstitutional. The statutes provide for the withholding of money from contractors as forfeitures and penalties on account of alleged violations of labor law, without a hearing.

Defendants include the Division of Labor Standards Enforcement, California ("DLSE"), and officials thereof. Defendants are responsible for enforcement of the aforesaid statutes.

Defendants have issued notices to withhold requiring awarding bodies to withhold money on account of alleged violations by Plaintiff. (Plaintiff denies any such violations. The notices to withhold were not based on complaints by Plaintiff's employees. Plaintiff believes that DLSE officials are participating in an effort by labor unions to force Plaintiff out of business because of its non-union status.) Plaintiff contends the notice to withhold procedure is in violation of the due process clause.

II.

RELIEF SOUGHT

Plaintiff seeks declaratory and injunctive relief. The relief sought will not prevent continued enforcement of California prevailing wage laws by proper means such as claims on statutory payment bonds, issuance of stop notices under the California Civil Code, or filing of lawsuits.

Plaintiff seeks a declaration that California Labor Code §§1727, 1730-33, 1775, 1776(g) and 1813 are unconstitutional. (A copy of *Cal. Labor Code* §§1720-1861 is Exhibit 9 hereto.) Plaintiff further seeks a declaration that Defendants' issuance of notices to withhold is unconstitutional, and that any such notices to withhold issued as to Plaintiff are invalid and of no force and effect. Plaintiff seeks an injunction prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff.

Alternatively, Plaintiff seeks a declaration that Defendants' application of the aforesaid statutes is unconstitutional, that notices to withhold against Plaintiff are invalid and without legal effect, and for an injunction

prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff.

III.

THE PARTIES

Plaintiff is a fire sprinkler contractor. (Ex. 1; Ben-Artzi Decl., p.1, l.5-12). Plaintiff installs fire sprinkler systems, primarily in new construction and/or renovation of existing buildings. (*Id.*) Plaintiff has performed work on public works projects in the State of California, and intends to continue to do so. (*Id.* at p.1, l.26-28). Most often, Plaintiff works as a subcontractor on public works projects. (*Id.*) Sometimes, Plaintiff works as a prime contractor on public works projects. (*Id.*)

Defendants include the Division of Labor Standards Enforcement, an agency of the State of California ("DLSE") and individuals (except Defendant AUBRY) who are officials/employees of DLSE. DLSE is a division of the Defendant Department of Industrial Relations of the State of California. Defendant AUBRY is the director of the Department of Industrial Relations. DLSE administers and enforces provisions of the California Labor Code, including those relating to the payment of prevailing wages on public works projects.

IV.

INTRODUCTION

Plaintiff filed a similar lawsuit previously (Case No. 94-8542-R). Prior to the initial lawsuit, DLSE had issued notices to withhold against Plaintiff on various projects

for which Plaintiff had acted as either a subcontractor or prime contractor. Plaintiff believed the allegations by DLSE were without merit, and that the notices to withhold constituted an effort to force Plaintiff out of business. DLSE settled the prior lawsuit by agreeing to release most of Plaintiff's money, in exchange for a dismissal without prejudice. Plaintiff agreed not to refile the lawsuit without further action by DLSE.

On or about July 11, 1995, DLSE issued a notice of penalty assessment, asserting penalties of $750 per day beginning July 1, 1995, and continuing indefinitely, on a project called CSU, San Bernardino (Ex. 29; Ex. 1, Ben-Artzi Decl., p.3, l.22-p.4, l.14). The penalty assessment indicated that Plaintiff had failed to comply with a request for copies of payroll reports within ten days. (*Id.*) Plaintiff was unaware of any request from DLSE for payroll reports. (The payroll reports are provided to the awarding body and/or prime contractor on all public works projects, and are public records.) Although Plaintiff agreed to provide the records forthwith, DLSE refused to rescind the penalty assessment. (*Id.*) DLSE has failed and refused to provide information regarding the factual basis for the penalty assessment, or how the amount thereof was calculated.[1] (*Id.*, Ex. 3, Seideman Decl., p.2,

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[1] Under California law, the only means available for a contractor to determine the basis for a notice to withhold is to file a lawsuit and undertake discovery. Moreover, under the statutes a subcontractor can file such a lawsuit only with an assignment by the prime contractor. Even the filing of a lawsuit does not assure that information as to the basis for the assessment of penalties is readily available. Under the statutes, the lawsuit oust be filed against the awarding body. Since DLSE

l.9-12). (Even if a penalty had been appropriate, it was grossly excessive because the statute (*Cal. Labor Code* §1776(g)) allows $25.00 per day, per employee, and Plaintiff had only a few employees.) On or about September 22, 1995, DLSE issued another notice to withhold on a project called Culver City, City Hall. (Ex. 2C; Ex. 1, Ben-Artzi Decl., p.4, l.19-25). The notice to withhold simply asserts that Plaintiff failed to pay "unnamed employees". (*Id.*) Plaintiff believes the notice to withhold is completely without merit. A third notice to withhold is pending on a project known as San Joaquin General Hospital, for which DLSE contends Plaintiff used improper classification of workers. (Ex. 1, Ben-Artzi Decl., p.3, l.1-13). Plaintiff disagrees, and believes the notice to withhold is without merit. (*Id.*)

The notices referred to above were issued without any hearing, pursuant to California law. (*Id.*, p.3, l.14-21). The notices include substantial penalties, which were assessed without any hearing. (Ex. 2)

Plaintiff contends that the assessment of penalties and forfeitures, and withholding money therefor, without a hearing violates the due process clause of the United States Constitution.

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is not a party, it is not subject to procedures for discovery as to a party. The only means of obtaining information from DLSE is to issue a subpoena for a deposition.

V.

SUMMARY OF ARGUMENT

The California Labor Code provides that all workers on a public works project must be paid "prevailing wages". The prevailing wage for each type of work is to be determined by the director of the Department of Industrial Relations. The statutes provide for the imposition of substantial penalties for violations of the prevailing wage requirements, and for payment of back wages. The public entity awarding the public works contract ("Awarding Body") is to withhold from the prime contractor any amount due for wages and/or penalties due to violations of the prevailing wage law. If the violation is by a subcontractor, the labor code provides for withholding payment from the subcontractor.

DLSE has adopted a procedure of issuing notices to withhold to Awarding Bodies directing the withholding of specified amounts of money purportedly due for wage violations and/or penalties. The notices to withhold are issued by enforcement officials of DLSE known as deputy labor commissioners. The deputy labor commissioner functions, essentially, in the capacity of an investigative officer. The notices to withhold are issued without any hearing. Notices to withhold may be, and often are, issued without any advance notice to the contractor. A contractor has no right to be notified of the allegation against it, or respond thereto, prior to the issuance of a notice to withhold. There is no procedure for a prompt hearing after the issuance of the notice to withhold.

Under the statutes, there is no remedy provided as a matter of right to a subcontractor aggrieved by a notice to

withhold. The only remedy available to a prime contractor is to file a lawsuit to seek recovery of the money withheld. The contractor has the burden of proof in such lawsuit to establish its right to recover the money. The due process clause of the United States Constitution requires a pre-deprivation hearing before withholding of the type described above can be effectuated. A pre-deprivation hearing may be dispensed with only under certain emergency circumstances justifying a temporary deprivation without a hearing. Under such circumstances, a prompt post-deprivation hearing must be provided. There are no emergency circumstances justifying issuance of notices to withhold without a pre-deprivation hearing. Moreover, there is no procedure for a prompt post-deprivation hearing. A subcontractor has no right to a hearing at any time. The right of a prime contractor to file a lawsuit seeking recovery of the money is not a prompt post-deprivation hearing required by due process. Moreover, DLSE never has the burden, at any time, to establish a violation. Labor Code §§1727, 1730-33, 1775, 1776(g), and 1813 are unconstitutional. The aforesaid statutes provide for the assessment of penalties and forfeitures, and withholding of money on account thereof, without a pre-deprivation hearing, or alternatively, without a prompt post-deprivation hearing.

Defendants' procedure of withholding money from contractors without a proper due process hearing is unconstitutional.

VI.

STATEMENT OF FACTS

A. THE STATUTORY SCHEME

The statutes relating to the payment of prevailing wages on public works projects are set forth at California Labor Code §§1720-1861 (*See*, Ex. 9, Copies of Statutes). Section 1771 provides that prevailing wages must be paid to all workers on public works projects. Section 1772 provides that the prevailing wage requirement applies to subcontractors. Section 1775 provides for penalties of up to $50.00 per day, per worker, for each violation. Section 1727 provides that wages and penalties due shall be withheld by the Awarding Body from monies otherwise due the contractor. Section 1729 provides that if the withholding from the prime contractor is due to a violation by a subcontractor, the prime contractor may withhold such amount from the subcontractor. Sections 1730-1733 provide that the only remedy after withholding is a lawsuit by the contractor, or its assignee, against the Awarding Body for recovery of the money withheld. The contractor has the burden to establish its right to the money withheld. *Cal. Labor Code* §1733. DLSE may (and does) defend the lawsuit. *Cal. Labor Code* §1733. There is no right of a subcontractor to challenge the withholding, except to the extent it obtains an assignment from the prime contractor. *Cal. Labor Code* §§1730-1731. Section 1776(g) provides for penalties for failure to comply with a request for payroll records within ten days, and for withholding on account thereof upon request of DLSE. Section 1813 provides for penalties for overtime work. Section 1727 provides for

withholding of penalties assessed under §1813. No hearing is required for assessment of the penalties, or withholding thereof.

The notice to withhold procedure utilized by DLSE is not expressly provided for by statute. *Cal. Labor Code* §90.5 provides that DLSE has authority to administer, and enforce, provisions of the Labor Code. including those relating to prevailing wages. Section 1727 provides that DLSE may investigate violations, and §1775 provides that the penalties are to be determined by the Labor Commissioner. The Labor Commissioner is the chief of DLSE. *Cal. Labor Code* §21. The Office of the Labor Commissioner, and DLSE, are the same entity. (Ex. 4, Miller depo. p.16, l.8-10). The California Courts have held that DLSE has statutory authority to issue notices to withhold. *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988).

B. THE NOTICE TO WITHHOLD PROCEDURE

The issuance of a notice to withhold is a standard procedure utilized by DLSE, purportedly to enforce the prevailing wage law.

Under the procedure utilized by DLSE, a deputy labor commissioner may authorize, execute, and issue a notice to withhold, with the approval of a senior deputy. (Ex. 4, Miller depo., p.34, l.12-p.35, l.13). There is no requirement that any type of hearing be held prior to the issuance of a notice to withhold. (*See*, Uncontroverted fact 18). There is no specific standard or burden to be applied in determining whether to issue a notice to withhold. (Ex. 4, Miller depo. p.39, l.21-24). There is no procedure to guard against the issuance of improper or excessive

notices to withhold. (Ex. 4, Miller depo. p.39, l.12-24; p.143, l.2-23).

The notice to withhold is issued on a standard form. (A copy is Exhibit 2 hereto). The notice to withhold is directed to the awarding body, and states that the amount of money stated therein must be withheld pursuant to the provisions of the Labor Code. (Ex. 2). The notice further states that the awarding body is to transmit the monies withheld to DLSE unless the contractor files a lawsuit for the recovery of money not later than ninety days after the completion of the project. (Ex. 2).

C. APPLICATION OF THE NOTICE TO WITHHOLD PROCEDURE TO PLAINTIFF

DLSE has issued notices to withhold against Plaintiff as both a prime contractor, and subcontractor. (Ex. 1, Ben-Artzi Decl., p.2, x.22-28). DLSE presently has three notices to withhold issued against Plaintiff, totalling more than $150,000. (*Id.* at p.3, l.14; Ex. 2). DLSE previously issued notices to withhold against Plaintiff for approximately $300,000, but which notices were eventually released. (Ex. 1, Ben-Artzi Decl., p.2, l.9-21: p.3, l.1-4). Plaintiff intends to continue to perform public works projects in California, as both a subcontractor and prime contractor. (*Id.* at p.1, l.27-28). Therefore, the existence of the unconstitutional statutes, and application thereof, constitutes a real and substantial threat of future harm to Plaintiff. (*Id.* at p.5, l.1-14).

VII.
ARGUMENT

Plaintiff contends that the assessment of penalties and forfeitures, and withholding money therefor, without a hearing, is unconstitutional. The vesting of such unconstitutional power in DLSE results, inevitably, in an abuse of power. DLSE can, and does, utilize the power to coerce money from contractors. Since large sums of money can be withheld, with no remedy except a lengthy lawsuit, DLSE can force contractors out of business and/or force contractors to forfeit sums of money to the state in exchange for a release of remaining monies withheld. Furthermore, DLSE officials can arbitrarily and selectively target contractors for harassment.

The power of state officials is not limited merely by their good intentions, which may be disregarded at their whim. Constitutional limitations have been established to prevent the abuse of such power. Plaintiff submits that the statutes, and procedures, are unconstitutional, and their enforcement or application against Plaintiff should be enjoined.

A. THE NOTICE TO WITHHOLD PROCEDURE IS UNCONSTITUTIONAL

1. A hearing is required for a temporary, non-final deprivation of property

The Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of property without due process of law. A temporary, non-final deprivation of property is a deprivation

under the terms of the Fourteenth Amendment. *Fuentes v. Shevin* 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct 1983 (1972); *Sniadach v. Family Finance Corp.* 395 U.S. 337: 23 L.Ed.2d 349: 89 S.Ct 1820 (1969). Due process requires a hearing for a deprivation, including a temporary non-final deprivation. *Fuentes supra, Sniadach supra.* "The right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Property* 510 U.S. ___; 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993).

2. This case involves regulatory, not proprietary conduct of the State

It should be noted that this case involves state officials acting in a regulatory, and not proprietary manner. The question of the application of due process to proprietary conduct of the State is not presented by this case, and need not be addressed by the Court. The courts have explained that there is sometimes a distinction in the restrictions placed on State conduct depending on whether the State is acting in its regulatory capacity, or in a proprietary manner. *See, Building Trades v. Associated Builders and Contractors* 507 U.S. ___, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993). The State acts in a proprietary manner when, as an owner of property, it conducts business as would any private owner of property, with no interest is setting policy. *Id.* at 576, 577. This case involves conduct by Defendants which is wholly regulatory. To wit, the imposition of penalties for alleged violations of the state labor code. The mandates of due process are fully applicable.

3. The notice to withhold causes a deprivation of a property interest

The issuance of a notice to withhold based on alleged violations by Plaintiff deprives Plaintiff of a property interest under the due process clause. California Labor Code §1729 provides that if an awarding body withholds money from a prime contractor due to alleged violations of a subcontractor, the prime contractor may withhold money from the subcontractor. Therefore, whether Plaintiff acts as a prime contractor, or subcontractor, the issuance of a notice to withhold results in the deprivation of money due for work performed.

In *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) the court held that withholding money from a contractor due to alleged prevailing wage violations was a deprivation of property. The court also so held in *Ames Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989), wherein the court stated: "The court finds that the government's suspension of payments to Ames does constitute a deprivation of property subject to the due process clause of the Fifth Amendment."

In *Fuentes*, the party did not hold legal title to the goods seized, but merely had a possessory interest. The court held that "the interest in continued possession and use of the goods" was a property interest protected by the due process clause. *Fuentes supra* at 86. The court stated that the Fourteenth Amendment "has been read broadly to extend protection to any significant property interest." *Id.* at 86. In *Goldberg v. Kelly* 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970) the court held that the right to receive government welfare payments was a property interest

protected by the due process clause. *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) involved the non-final seizure of real property which was rented to tenants. The court stated that the government "contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection." *Daniel supra*, at 501. The court in *Daniel* explained that "individual freedom finds tangible expression in property rights." *Id.* at 505. Certainly, the right to receive contract payments for work performed is a property interest protected by the due process clause.

4. A pre-deprivation hearing is required except in extraordinary circumstances

Generally, a pre-deprivation hearing is required by due process. *Fuentes supra, Sniadach supra.* However, a postdeprivation hearing is allowed in extraordinary situations. *Fuentes supra* at 90. "Only in extraordinary circumstances involving the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process may the government dispense with the requirement of a hearing prior to the deprivation.". *Sinaloa Lake Owners Association v. City of Simi Valley* 882 F.2d 1398, 1405 (9th Cir. 1989). "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial

deprivation." *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988). In order to justify proceeding without a pre-deprivation hearing there must be "a special need for very prompt action." *Fuentes supra* at 91. "To establish exigent circumstances, the Government must show that less restrictive measures . . . would not suffice." *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 505; 126 L.Ed.2d 490 (1993). The requirement of neutral decisionmaking "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *Id.* at 502.

5. A pre-deprivation hearing is needed for a notice to withhold

There is no special need for prompt action with regard to withholding money from a contractor.

There are no extraordinary circumstances justifying prehearing withholding for alleged wages due. The only conceivable argument is that withholding is necessary to secure the availability of funds to pay underpaid workers. However, the notice to withhold procedure is unnecessary in this regard. Under California law, a payment bond issued by a surety company must be provided for every public works project.[2] *Cal. Civil Code* §§3247, 3248. The bond guarantees payment of wages due. Moreover, the Stop Notice Procedure in the California Civil

[2] There is an insignificant exception for projects under $25,000.

Code allows for withholding of money due for wages on all public works projects. *Cal. Civil Code* §3181 *et seq.*

In *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) the court held that a pre-deprivation hearing was required before seizure of real property used for drug dealing. The court held that seizure after ex parte application to a magistrate, and approval thereof, was violative of due process. The court stated that the government must show that less restrictive measures, such as a "bond," would not suffice. *Daniel supra.* at 505. Where means, short of seizure, are available, "[t]here is no reason to take the additional step of asserting control over the property without first affording notice and an adversary hearing." *Daniel supra.* at 504. A bond guaranteeing payment of wages is posted for every public works project in California. Additionally, statutory stop notice rights apply to wage claims. There are no exigent circumstances justifying seizure without an adversary hearing.

As to penalties, clearly there is no special need for very prompt action. There is no imminent injury to be suffered by a delay in the collection of punitive sanctions.

In *Daniel supra* the court stated:

> "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. It makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.* at 502 [citations omitted].

The State of California keeps penalties seized by DLSE. (*See*, Uncontroverted fact 34). The State has a direct pecuniary interest in maximizing it's ability to coerce money from contractor's. The withholding of money without a neutral hearing is an effective way to coerce an agreement to forfeit of a portion thereof. The action of the State in this case deserves close scrutiny, as the State has a direct pecuniary interest.

The court in *Daniel* found that "the practice of ex pane seizure . . . creates an unacceptable risk of error." *Daniel supra*. at 501. The court noted that " 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to provide a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' " *Daniel supra*. at 502, quoting *Joint Anti-fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172; 71 S.Ct. 624, 647-649; 95 L.Ed. 817 (1951).

A failure to provide pre-deprivation hearing renders the notice to withhold procedure unconstitutional.

6. Where extraordinary circumstances Justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided. *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988). In determining whether a post-deprivation hearing procedure is reasonably prompt the court should "examine the importance of

the private interest and the harm to this interest occasioned by the delay; the justification offered by the government for delay in its relation to the underlying governmental interests: and the likelihood that the interim decision may have been mistaken." *Mallen supra* at 242. In *Awes Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989) the court held that where money is withheld from a contractor due to alleged prevailing wage violations without a pre-deprivation hearing, the contractor is "entitled to a reasonably prompt post-suspension hearing." *Id.* at 509.

7. A prompt post-deprivation hearing is not available under the notice to withhold procedure

Assuming arguendo that Defendants are not required to provide a pre-deprivation hearing with regard to the issuance of a notice to withhold, there must be a prompt post-deprivation hearing. The procedure utilized by Defendants does not provide for a prompt post-deprivation hearing. The only procedure for obtaining a hearing is the filing of a lawsuit by the prime contractor, or its assignee. A subcontractor has no right whatsoever to a hearing, except to the extent it obtains an assignment from the prime contractor. The right of a prime contractor, or its assignee, to file a lawsuit, does not constitute a prompt post-deprivation hearing.

The time for a trial on such a lawsuit filed in State Court is subject to the court's discretion, and the court's calendar. A plaintiff's only right is to have a trial within

five years. *Cal. Code of Civil Procedure* §583.310. The scheduling of a trial may be greatly impacted by matters affecting court congestion, such as the recently adopted "three strikes" legislation. Moreover, even if a contractor prevails in such a lawsuit, the monies remain withheld pending any appeal. *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988): *Cal. Labor Code* §1731. Generally, a final determination of a lawsuit will take at least several years. (Ex. 3, Seideman Decl., p.1, l.27-p.2, l.8). A contractor has no right to a determination in any shorter period. The right of a prime contractor, or its assignee, to file a lawsuit to recover the money withheld is not the prompt post-deprivation hearing required by due process. Moreover, a subcontractor has no right to file such a lawsuit.

The court in *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) held that withholding money for purported prevailing wage violations was unconstitutional where the contractor had to wait six months to one year to obtain release of monies improperly withheld. Under the procedure in issue here, a contractor must wait years to obtain release of monies improperly withheld. Moreover, a subcontractor has no right of its own to contest the withholding. Inasmuch as there is no pre-deprivation hearing, and no right to a prompt postdeprivation hearing, the procedure is unconstitutional.

In *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 505; 126 L.Ed.2d 490 (1993) the court found that a post-seizure right to a trial was insufficient to allow a pre-hearing seizure. The court stated that "the availability of a post-seizure hearing may be no recompense for losses caused by erroneous seizure. Given

the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure." *Id.* at 502.

The application of the *Mallen* factors mandate that the procedure fails to provide a reasonably prompt post-deprivation hearing. *See, Federal Deposit Insurance Corporation v Mallen* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988).

The first *Mallen* factor is the importance of the private interest and the harm to this interest occasioned by the delay. The private interest is the right to receive payment for work performed. Only a small portion of a contractor's payment is attributable to profit. Most of a contractor's price is determined by actual costs of performance. (*See*, Ex. 1, Ben-Artzi Decl., p.5, l.1-7). The receipt of monies due for work performed are necessary to pay for materials and labor incurred in the work. The withholding of money deprives the contractor of the ability to cover its costs. The result is not merely a temporary loss of profit, but a threat to the contractors survival. A contractor can very easily be forced out of business if it is deprived of money to pay wages and suppliers.

The aforesaid problem was referred to by the court in *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993). In *Bailey*, the court held that the Department of Labor's withholding of money from a contractor due to alleged prevailing wage violations was unconstitutional where a post-deprivation hearing would take from six months to a year. The court stated:

"It is undisputed that plaintiff received no due process hearing by a neutral decision maker prior to suspension of the payments due her for contract work performed for the government. While the Department of Labor has commenced an administrative proceeding against plaintiff, it is undisputed that these proceedings will take from six months to a year to reach a conclusion as to whether or not plaintiff was in fact underpaying her employees and, if so, in what amount.

"It is undisputed that without the cash flow from the contracts, plaintiff will not be able to continue to perform the contracts. She will in substance be put out of business: and the ten employees who are employed under the two contracts in question will be out of work.

> In order to recover immediately (and hold for six months to a year) the sums of money arguably due plaintiff's employees, defendant has come perilously close to destroying plaintiff's business and, in the process, terminating the jobs of the ten employees who defendant would theoretically benefit – six months to a year from now." *Id.* at 262-263.

The failure to provide a prompt hearing causes substantial harm to an important private interest. The cutting off of cash flow to a contractor may not only force the contractor out of business, but force all of its employees. into the unemployment lines.

The second *Mallen* factor is the governmental justification for the delay, and its relation to the governmental

interest. Plaintiff is not aware of any legitimate justification for the delay. The delay bears no relation to any legitimate governmental interest.

The third *Mallen* factor is the likelihood of mistake. In *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 505; 126 L.Ed.2d 490 (1993) the court, in holding that seizure of real property used for drug dealing after ex parte hearing was unconstitutional, said "[t]he practice of ex parte seizure, moreover, creates an unacceptable risk of error." *Id.* at 501.

In *Chalkboard v. Brandt* 902 F.2d 1375 (9th Cir. 1989) the court explained, that the risk of erroneous deprivation is high where the underlying determination is based on credibility of witnesses. The court stated that the risk of error is less "where the factual issue to be determined was susceptible of reasonably precise measurement by external standards." *Id.* at 1381. For example, chemical testing of a horse for drugs, *Barry v. Barachi* 443 U.S. 55, 65; 99 S.Ct. 2642, 2649; 61 L.Ed.2d 365 (1979); or suspension of a driver's license when convicted of a predetermined number of offenses. *Dixon v. Love* 431 U.S. 105, 113; 97 S.Ct. 1723, 1727; 52 L.Ed.2d 321 (1979).

The determination of purported prevailing wage violations generally involves judgments depending on credibility of witnesses. For example, DLSE asserted a notice to withhold against Plaintiff based on purported "unnamed employees". (Ex. 2C; Ex. 1, Ben-Artzi Decl., p.4, l.19-25). Plaintiff contends that no such unnamed employees exist, but rather are mere fabrications of DLSE. (*Id.*) The factual issue depends on the credibility of

witnesses. There is no precise objective external measurement, such as a chemical test, or pre-determined convictions. Under such circumstances, the risk of an erroneous deprivation is high where no hearing is provided. *Chalkboard supra*.

There is no reasonably prompt post-suspension hearing at which a contractor has the right to obtain release of money withheld.

VI.

CONCLUSION

California Labor Code §§1727, 1730-33, 1775, 1776(g) and 1813 are unconstitutional. The notice to withhold procedure utilized by Defendant's is unconstitutional.

Declaratory relief is a proper remedy. 28 U.S.C. 2201. Plaintiff respectfully submits that the court should issue a judgement declaring that the aforesaid statutes are unconstitutional, the notice to withhold procedure is unconstitutional, and that any notices issued as to alleged violations by Plaintiff are invalid.

An injunction is also a proper remedy. The unconstitutional withholding of money causes the threat of irreparable injury for which there is no adequate remedy at law. The eventual recovery of money withheld does not avoid the harm from the inability to use the money in the meantime, or the irreparable damage to reputation. Plaintiff respectfully submits that Defendant should be

enjoined from enforcing or applying the aforesaid statutes, or issuing notices to withhold, as to Plaintiff.

DATED: October 16, 1995

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Plaintiff hereby requests that the Court take judicial notice of the following facts in accordance with Rule of Evidence 201:

1. Defendants AUBRY, MILLER, and BRADSHAW were defendants in the lawsuit titled *G & G Fire Sprinklers, Inc. v. Juan Garza, et al.*, Case No. CV-94-8542 R. The court is further requested to take judicial notice of the papers and pleadings filed in said lawsuit.

2. Defendant LLOYD W. AUBRY, JR., is the Director of the Department of Industrial Relations, State of California.

DATED: October 16, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

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G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA	) CIVIL NO. 95-4839 R) STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW [Central District Local Rule 7.14.1] **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

After consideration of the papers in support of and in opposition to plaintiff's motion for summary judgment and the oral argument of counsel, the Court determines that the following facts have been established as,

UNCONTROVERTED FACTS

1. The Department of Industrial Relations of the State of California is an agency of the State of California.

[*Cal. Labor Code* § 50.]

2. The Division of Labor Standards Enforcement (hereinafter "DLSE") is a division of the Department of Industrial Relations of the State of California.

[*Cal. Labor Code* § 79.]

3. The Labor Commissioner of the State of California is the chief of DLSE.

[*Cal. Labor Code* § 21.]

4. Defendant Lloyd W. Aubry, Jr. is the Director of the Department of Industrial Relations of the State of California.

[Plaintiff's Request for Judicial Notice, paragraph 2.]

5. Defendant Victoria Bradshaw was the Labor Commissioner for the State of California.

[Ex. 4, Deposition of Roger D. Miller, Volume I, page 15, line 22 – page 16, line 2; Bradshaw resigned effective September 30, 1995, and no replacement has been appointed.]

6. Defendant Roger Miller is a Senior Deputy Labor Commissioner employed by DLSE.

[Ex. 4, Deposition of Roger Miller, p.7, l.14-17; p.10, l.5-7; Ex. 1, Declaration of Itai Ben-Artzi, p.4, l.11-13.]

7. Defendants Daniel Dellarocca and Rosa Frazier are Deputy Labor Commissioners employed by DLSE.

[Ex. 2 A, Notice to Withhold; Ex. 2D, Notice to Withhold.]

8. California law requires that persons performing work at public works projects in California be paid "prevailing wages".

[*Cal. Labor Code* § 1771.]

9. California law provides for the imposition of penalties upon contractors responsible for violations of laws relating to the payment of prevailing wages at public works projects.

[*Cal. Labor Code* §§ 1775, 1776(g), 1813.]

10. California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 provide for the assessment of penalties, and withholding of money on account thereof from a prime contractor, without a prior hearing.

[*Cal. Labor Code* §§ 1727, 1730-33, 1775, 1776(g), 1813.]

11. California Labor Code §§ 1727 and 1775 provide for the assessment of wages due by a prime contractor, or any subcontractor thereof, and withholding of money therefor from the prime contractor, without a prior hearing.

(*Cal. Labor Code* §§ 1727, 1775.]

12. The California Labor Code provides that where money is withheld from a prime contractor on account of a prevailing wage violation by a subcontractor, the prime contractor may withhold such money from the subcontractor.

[*Cal. Labor Code* § 1729.]

13. DLSE undertakes the function of enforcement of the California Labor Code provisions relating to payment of prevailing wages.

[Ex. 4, Deposition of Roger D. Miller, Volume I, page 7, lines 14-17; page 10, lines 13-17; page 13, lines 18-25.]

14. The aforesaid prevailing wage requirement applies to all construction projects for which the entity awarding the prime contract is a public entity (hereinafter referred to as the "Awarding Body").

[*Cal. Labor Code* §§ 1720, 1722.]

15. Defendants have adopted, and utilized, the practice and procedure of issuing notices to withhold money to Awarding Bodies on account of wages and penalties due for alleged violations of the California laws relating to payment of prevailing wages.

[Ex. 2, Notices to Withhold;

Ex. 4, Deposition of Roger D. Miller, Volume I, page 33, line 10 - page 41, line 19; page 71, lines 3-10; page 149, lines 13-16.]

16. The notices to withhold issued by defendants require Awarding Bodies to withhold monies otherwise due to contractors in the amount set forth in the notice.

[Ex. 2, Notices to Withhold;

Ex. 5, Deposition of Roger D. Miller, Volume II, page 301, lines 8-12.; Exhibits 2A, 2B, 2C and 2D, Notices to Withhold;

Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 9-11.]

17. The result of the issuance of a notice to withhold by Defendants is the withholding of money otherwise due and payable to contractors who have been the subject of such notice to withhold.

[Ex. 4, Deposition of Roger D. Miller, Volume I, page 301, lines 8-12: Exhibits 2A, 2B, 2C and 2D, Notices to Withhold;

Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 9-11.]

18. There is no hearing of any type held prior to the issuance of a notice to withhold for the purpose of determining whether violations of the law have occurred, and

if so, to what extent, or the amount of wages and penalties due as a result thereof.

[*Cal. Labor Code* §§ 1727, 1776(g); Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 14-17;

Ex. 4, Deposition of Roger D. Miller, Volume I, page 33, line 10 - page 41, line 19; page 71, lines 3-10; page 1, lines 1-16; page 143, lines 2-23; page 150, lines 14-18; page 179, lines 11-21; page 184, lines 18-20.;

Ex. 5, Deposition of Roger D. Miller, Volume II, page 266, line 16 - page 267, line 1: 23; page 238, line 14 - page 240, line 5.]

19. Notices to withhold may be, and often are, issued without advance notice to the contractor. There is no requirement that prior to the issuance of a notice to withhold, the contractor be notified of the allegation against it, with evidence supporting said allegation, or that a contractor be provided an opportunity to respond thereto.

[Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 14-21;

Ex. 4, Deposition of Roger D. Miller, Volume I, page 33, line 10 - page 41, line 19; page 71, lines 3-10; page 1, lines 1-16; page 143, lines 2-23; page 150, lines 14-18; page 179, lines 11-21; page 184, lines 18-20;

Ex. 5, Deposition of Roger D. Miller, Volume II, page 266, line 16 - page 267, line 1; page 238, line 14 - page 240, line 5.J

20. A prime contractor has no right to a hearing to obtain release of money withheld by a notice to withhold,

except for the right to file a lawsuit under California Labor Code § 1731-1733.

[*Cal. Labor Code* 1731-1733;

Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 1220.]

21. A prime contractor must obtain a judgment which is final, including all rights of appeal, in a lawsuit filed under *Cal. Labor Code* §§ 1731-1733 in order to have a right to obtain release of movies withheld pursuant to a notice to withhold.

[*Cal. Labor Code* § 1731; *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988).]

22. A subcontractor whose alleged violation of prevailing wage law is the basis of a notice to withhold has no right to a hearing as to the notice to withhold, unless the subcontractor obtains an assignment of the prime contractor's right to a lawsuit under *Cal. Labor Code* § 1731-1733.

[*Cal. Labor Code* § 1732.]

23. Plaintiff is a contractor who performs primarily fire sprinkler installations at projects in the State of California.

[Ex. 1, Declaration of Itai Ben-Artzi, page 1, lines 10-13.]

24. Plaintiff has performed, and intends to continue to perform, work on a number of public works projects in the State of California. Plaintiff has performed such work, and intends to perform such work in the future, as both a subcontractor and prime contractor.

[Ex. 1, Declaration of Itai Ben-Artzi, page 1, lines 26-28; page 2, lines 1 - 8.]

25. DLSE has issued notices to withhold on account of alleged violations of prevailing wage law by Plaintiff where Plaintiff has acted as subcontractor, and prime contractor.

[Ex. 1, Declaration of Itai Ben-Artzi, page 2, lines 22-28.]

26. DLSE has issued notices to withhold to the Awarding Bodies of various public works projects on account of alleged violation of the prevailing wage law by Plaintiff. The projects for which such notices to withhold have been issued include those known as Moore Hall Seismic Renovation at the University of California, Los Angeles; University Center at the University of California, Santa Barbara; Recreation Center at the University of California, Santa Barbara; The Pyramid at California State University, Long Beach; Anaheim City Utilities Building; CSU, San Bernardino; San Joaquin General Hospital; Culver City, City Hall.

[Exhibits 2A, 2B, 2C and 2D, Notices to withhold;

Ex. 1, Declaration of Itai Ben-Artzi, page 2, lines 9-21.]

27. The aforesaid notices to withhold issued regarding Plaintiff were issued without any prior hearing.

[Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 14-17.]

28. Plaintiff disputes the correctness of the notices to withhold.

[Ex. 1, Declaration of Itai Ben-Artzi, page 2, lines 19-21.]

29. As a result of those notices to withhold still pending, which were issued by DLSE as to Plaintiff, there is at least $120,000 which has been withheld from monies otherwise due to Plaintiff.

[Ex. 1, Declaration of Itai Ben-Artzi, page 4, lines 26-28.]

30. The effect of a notice to withhold is to reduce, or cut off, payments to Plaintiff for work performed. Inasmuch as Plaintiff intends to perform further public works projects in the future, there is a substantial and imminent threat that the issuance of additional improper notices to withhold would impair Plaintiff's cash flow, and affect its ability to do business.

[Ex. 1, Declaration of Itai Ben-Artzi, page 5, lines 1-14.]

31. The issuance of notices to withhold affects Plaintiff's reputation in the industry.

[Ex. 1, Declaration of Itai Ben-Artzi, p. 5, lines 12- 14.]

32. Under California law a payment bond issued by an approved surety must be posted for every public works project, except for projects less than $25,000. The payment bond provides a guarantee of the payment of, among other things, wages due to persons who work at the project.

[*Cal. Civil Code* § 3247, 3248]

33. The stop notice procedure for public works in California allows for withholding by awarding body of money upon a claim for wages due.

[*Cal. Civil Code* § 3181.]

34. The monies collected by DLSE as penalties for violations of the prevailing wage law are kept and used by the State of California.

[Ex. 4, Miller depo. p.157, l.5-13; *Cal. Labor Code* § 1775.]

35. Defendants AUBRY, BRADSHAW and MILLER were parties to a prior lawsuit filed by Plaintiff, and dismissed without prejudice pursuant to a settlement agreement, alleging that the withholding of money for alleged violations of the California prevailing wage law without a prior hearing, or prompt post-deprivation hearing, was unconstitutional under the due process clause of the United States Constitution.

[Plaintiff's Request for Judicial Notice, paragraph 1.]

Based on the foregoing Uncontroverted Facts, the Court now makes its,

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 42 U.S.C. 1983, 28 U.S.C. 1343 (a)(4), and 28 U.S.C. 2201-2202.

2. California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 violate the due process clause of the fourteenth amendment of the United States Constitution.

3. The assessment of penalties and the withholding of money from contractors for violations of the California

prevailing wage law without a prior hearing violates the due process clause of the fourteenth amendment to the United States Constitution.

4. The notice to withhold procedure utilized by Defendants is unconstitutional under the due process clause.

5. An actual controversy exists between Plaintiff and Defendants with regard to the constitutional issues referred to above.

6. Defendants procedure for withholding without a prior hearing results in irreparable injury and substantial threat of irreparable injury, for which there is no adequate remedy at law.

7. Judgment for declaratory relief and injunctive relief shall be issued consistent herewith.

Dated: _____

_____
UNITED STATES
DISTRICT JUDGE

G&GFIRE:Bradshaw'acts.Stm

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